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No. 83-520

IN THE

Supreme Court of the United States

September Term, 1983

GENE THOMAS MEYER,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. Was the Petitioner denied his right to protection against self incrimination as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution by the use of the two statements taken during interrogation against him?

II. Was the Petitioner denied his rights to assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution during the unreasonably long and unlawful detention for purposes of interrogation?

III. Did the Petitioner waive any right to appeal the issues of this petition because of inadequate representation by the Public Defender in the appeal of the Circuit Court conviction?

IV. Was the Petitioner denied his right to be present in all stages of his trial as guaranteed by the United States Constitution?

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STATE OF MARYLAND,

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PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

STATEMENT OF JURISDICTION

In April, 1978 Petitioner was convicted of first degree murder of a woman and her three-month-old infant in the Circuit Court for Prince George's County, Maryland. The conviction was affirmed in *Meyer* v. *State*, 43 Md. App. 724 (1979).

On October 28, 1982 Meyer filed a Petition for Post-Conviction Review in the Circuit Court for Prince George's County, Maryland. The Petition raised claims that Petitioner was denied his rights under, *inter alia*, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

On April 11, 1983 the Honorable James H. Taylor of the Circuit Court for Prince George's County, Maryland denied Meyer's Petition for Post-Conviction Relief. It was from that decision that Meyer appealed to the Court of Special Appeals which affirmed Judge Taylor's ruling in an unreported opinion dated July 27, 1983.

That decision represents a final judgment by a Maryland Appellate Court from which no further right to appeal to the Maryland Court of Appeals exists. *Maryland Code Annotated,* "Courts and Judicial Proceedings," Section 12-201-202; *Williams* v. *State,* 292 Md. 201 (1981).

The grounds on which the jurisdiction of this court is invoked are (1) that the Petitioner was denied his right to protection against self-incrimination as granted by the Fifth and Fourteenth Amendments, (b) his right to the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments, and (c) his right to be present at all stages of his trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On October 28, 1982 Meyer filed a "Petition for Post-Conviction Review" in the Circuit Court for Prince George's County, Maryland. Maryland Code Annotated, Article 27, Section 645. In that Petition Meyer raised five reasons why his conviction should be reversed and he be given a new trial:

I. That the Petitioner was denied his right to protection against self incrimination as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution, and Article 23 of the Maryland Declaration of Rights, by the use of the two statements taken during interrogation against him.

II. That the Petitioner was denied his rights to assistance of counsel as guaranteed by the Sixth and fourteenth Amend-

ments of the United States Constitution and Article 21 of the Maryland Declaration of Rights, during the unreasonably long and unlawful detention for purposes of interrogation.

III. That Petitioner was denied his right to a timely copy of the arrest warrant as guaranteed by Maryland law.

IV. That Petitioner was denied his right to be present at all stages of his trial as guaranteed by Maryland law.

V. That Petitioner did not waive any right to appeal the issues of this petition because of inadequate representation by the Public Defender in the appeal of his Circuit Court conviction.

On April 11, 1983 the Honorable James H. Taylor of the Circuit Court for Prince George's County, Maryland denied Meyer's Petition for Post-Conviction Relief and issued a Memorandum., (Apx. I) However, Meyer contends that Judge Taylor did not properly address issues I, II and V. The decision merely stated that those issues had been disposed of by the Court of Special Appeals in *Meyer* v. *State,* 43 Md. App. 427 (1979). By filing an Application for Leave to Appeal Meyer appealed Judge Taylor's finding to the Court of Special Appeals.

On July 27, 1983 the Court of Special Appeals, in an unreported decision, affirmed Judge Taylor's findings and denied Meyer leave to appeal. Although the Court was asked to address the issues of whether or not Judge Taylor improperly summarily disposed of the issues regarding the police department's refusal to allow Meyer's counsel to see him during the interrogation and the issue of whether or not Meyer's appellate counsel improperly refused to raise *Miranda* violations in *Meyer* v. *State,* 43 Md. App. 724 (1979), the Court of Special Appeals in its opinion also did not address those issues (Apx. K). The federal questions sought to be reviewed here were first raised by petitioners' trial counsel in the original murder trial, in the Petitioners' Petition for Post Conviction Relief (Apx. D) and in the Petitioners' Application for Appellate Review (Apx. J). The

issues raised were discussed by the Court of Special Appeals in the decision denying appellate review. (Apx. K)

CONSTITUTIONAL PROVISIONS

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[Amendment XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any peson within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On September 23, 1977, Carol Ann Lewis and her baby daughter, Heather, were stabbed to death in their home, in Bowie, Maryland. Mrs. Lewis' husband, Lon Lewis, discovered the bodies at approximately 6:45 p.m. Mr. Lewis was subsequently questioned at times over the next two weeks until on October 7, 1977, when he confessed to conspiring with his co-worker, Gene T. Meyer, to murder their wives. With Meyer thus implicated, the police drew up a warrant for Meyer's arrest for the murder of Carol and Heather Lewis, attaching to it a copy of the Lewis confession.

On October 8, 1977, a Montgomery County Judge issued the warrant for Meyer's arrest. Officer Hatfield of the Prince George's (P.G.) County police immediately went to Meyer's apartment in Rockville, roused Meyer from bed, placed him under arrest at approximately 7:30 a.m., and immediately took him out to a waiting police cruiser. Meyer was not given a copy of his arrest warrant, nor was a copy of the search warrant for his apartment given to either Meyer or his wife. The Prince George's County police escorted Meyer immediately after the arrest to police headquarters for purposes of taking a statement. The Meyers' apartment was searched for evidence soon after their departure. The police left a copy of the search warrant on the table of the apartment.

Meyer was taken to the Prince George's Bureau of Criminal Investigations (BCI) in Forestville, Maryland and placed in an interrogation room. He spent approximately 15 hours at B.C.I. that day, mostly under interrogation, and made two (2) statements.

Testimony at Meyer's subsequent murder trial conflicted as to the extent of questioning and discussion which transpired during the ride from Rockville to Forestville. Officer Hatfield claimed that he placed Meyer immediately in the B.C.I. interrogation room because of Meyer's request to read Lewis' confession. Hatfield produced the Lewis statement and read it to

Meyer, repeatedly interjecting questions as they progressed through the text. At the conclusion, Hatfield testified that Meyer requested to "tell his side" and, consequently, Hatfield took a statement from Meyer.

This statement generally denied any involvement with the killings, though Meyer did admit to knowing that Lewis wanted to "get rid" of his wife, and to being at the Lewis home on the evening of September 22, 1977, and to owning a light colored suit and dark briefcase at that time. These admissions, together with the statement as a whole, were later used in the State's case against Meyer.

Meyer testified that neither Hatfield nor any other officer ever informed Meyer of his constitutional rights before or during the taking of the first statement, and in fact repeatedly refused his requests for an attorney. Hatfield testified, however, that he read Meyer his *Miranda* rights off a card both in the cruiser outside Meyer's apartment and in the interrogation room prior to taking the first statement. He further claimed that Meyer at no time requested to see an attorney or make a phone call. There was, however, no corroborating testimony to support Hatfield's claim that he read Meyer his rights, as in each instance cited, Meyer and Hatfield were alone. While Meyer signed each page of the statements taken both that morning and that evening, no waiver form was ever signed by Meyer.

Meyer was held at B.C.I. from his arrest at 7:00 a.m. until approximately 4:00 p.m., at which time he was taken to Upper Marlboro to be formally charged by a District Commissioner. Prior to this time, however, Meyer was photographed for the purpose of compiling a "photo-spread" for identification by the sole eye-witness, Darlene Brown. He was also formally processed (i.e. fingerprinted, etc.) sometime close to 4:00 p.m. The actual dictation of the first statement, written by Hatfield, took place between approximately 11:00 a.m. and 4:00 p.m.

At 4:00 p.m., the police took Meyer before District Commissioner O'Brien for a brief time not exceeding ten minutes.

O'Brien testified that he read Meyer the charges, informed him of his right to counsel, and advised him as to the availability of the Public Defender. Meyer signed an initial appearance report which advised Meyer of his Court date and bond status, and signed a form requesting a preliminary hearing. At no time during appearance did Meyer sign a formal waiver of his rights. O'Brien signed these two documents and a third committing Meyer to the custody of the Sheriff and the county jail.

Meyer was thereupon taken back to B.C.I., following a short detour to purchase a dinner for him. Meyer was placed in an interrogation room at B.C.I. and Morrissette began to question him. Morrissette testified that he read Meyer his *Miranda* rights, but again Meyer denies ever being so informed. There was no corroborating testimony for Morrissette's account.

Morrissette continued questioning Meyer until approximately 9:00 p.m. at which time Morrissette recessed in preparation for recording Meyer's statement. Meyer claims that Morrissette intimated that he could somehow "make it easy" on Meyer if he confessed. Morrissette denies this as he denies ever alluding generally to the probability that if Meyer didn't confess "they would drop the pill" on him in prison (evidently a reference to some unspecified threat of death). Morrissette typed a statement from Meyer in a question and answer format from 9:20 p.m. until approximately 10:00 p.m. Although this statement generally acknowledged guilt in the slaying of Carol Lewis, Meyer denied stabbing Heather and answered many questions with "I don't know" replies.

After Morrissette had finished typing the statement, he submitted a written waiver of rights for Meyer to sign, which Meyer refused. Morrissette then consulted with a superior, Lieutenant Crump, who instructed Morrissette to add the question, "Were you advised of your constitutional rights by the District Court Commissioner?", to which Meyer replied that he didn't remember. Meyer did sign each of the pages of the typed statement. Following completion of the statement, and Meyer's

refusal to sign the written waiver, Meyer was finally taken to the county jail.

During the latter half of the day, Mrs. Meyer, accompanied by Mrs. Meyer's mother and two friends, Mr. and Mrs. Lash, waited vainly for a number of hours to see Meyer. Police at B.C.I. told Mrs. Meyer that she could neither see her husband that day, nor get a lawyer for him, as Meyer had to request one himself. Later an attorney, David Martin, was instructed by a partner in his firm on behalf of Mrs. Meyer to contact Meyer as soon as possible. Martin testified to the events of that day as follows: Martin first called B.C.I. around 6:30 p.m. to speak with Meyer and identified himself as Meyer's attorney. He was told then that Meyer was eating dinner and couldn't speak to him. When Martin tried again at 7:00 p.m., he was told that Meyer had been transferred to the Prince George's County Detention Center. Martin proceeded to the County Detention Center in Upper Marlboro, only to find that Meyer was, in fact, still at B.C.I. When Martin arrived at B.C.I. at approximately 8:30 p.m., he was told by an officer that Meyer had "just left" for the County Detention Center. Martin returned to the County Detention Center and determined after a half hour search that Meyer was not there. Another call to B.C.I. sometime close to 10:00 p.m. was placed, and Martin was again told Meyer was on his way. This time Meyer did arrive sometime past 10:30 p.m. at the County Detention Center and was only then able to meet with Martin.

On October 7, 1977, Prince George's police searched Meyer's apartment during which they seized a pair of Meyer's shoes later introduced into evidence, and located Meyer's car at his mother's home in Northern Virginia. The car was towed to a Prince George's police station, and searched, at which time the police removed a black briefcase which was subsequently introduced as evidence.

Later the police visited the home of the twelve (12) year old eyewitness Darlene Brown, to show her a photo-spread compiled

and determined if she could identify Meyer as the man she had reported seeing in front of the Lewis' home the day of the murders. Brown picked out Meyer from the collection of six photographs. At trial Meyer strongly protested Brown's identification as impermissibly suggestive. Meyer contended that since her sighting had been made at a distance of approximately 100 yards, she was prone to remember only the most distinctive features, such as his unusual height and hair style. In the photospread Meyer was clearly the tallest and the only one to have hair over his ears (all other five photos were of Prince George's detectives).

At his trial in April of 1978, Meyer's salient defense centered on the contention that his statements were made involuntarily, which therefore made them inadmissible as the tainted product of illegal detention, and denial of his *Miranda* rights. The delay of nine (9) hours, Meyer contended, was illegal and thereby tainted both statements taken that day. Meyer additionally contended that both the in-court and out-of-court identification of Meyer by Darlene Brown as impermissibly suggestive and therefore inadmissible. Meyer lost on all fronts and was convicted for first degree murder of Carol Lewis and second degree murder of the daughter, Heather. He received consecutive sentences of life imprisonment and thirty (30) years respectively.

Meyer appealed the conviction and was represented by a Public Defender for that purpose. The issues raised on appeal by the Public Defender included the failure of the police to bring Meyer before a District Commission for formal charging without unnecessary delay pursuant to Maryland District Rule 723, and therefore that is two statements were tainted by the unnecessary delay and the Commissioner's failure to advise him of his right to counsel, as well as the identification of Meyer by Darlene Brown as being impermissibly suggestive and, hence, inadmissible. See, *Meyer* v. *State,* 43 Md. App. 427 (1979).

For the purposes of this Petition it is significant to note that the Court of Special Appeals remarked that Appellant did not

challenge the voluntariness of his statement or the adequacy of his *Miranda* rights. Meyer, supra, at 432, fn.4.

The Court of Special Appeals affirmed Meyer's conviction, finding that while the nine (9) hour delay was "unnecessary" and improper, the first statement was inadmissable as being exculpatory and "harmless." The second statement was also ruled admissable by that court as the product of a deliberate reflection and independent decision. None of the questions concerning the voluntariness of the *Miranda* rights or the denial of Meyer's right to counsel were raised by the Public Defender and were therefore not addressed by the Court.

Meyer filed petitions for Certiorari to the Court of Appeals of Maryland and this Court, both of which were denied. *Meyer* v. *State,* 43 Md. App. 427, cert. denied, 286 Md. 750, cert. denied, 446 U.S. 938 (1979).

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER WAS DENIED HIS RIGHT TO PROTECTION AGAINST SELF INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS BY THE USE OF THE TWO STATEMENTS TAKEN DURING INTERROGATION AGAINST HIM.

In order for Meyer's conviction to stand, the State must have etablished that Meyer made his two statements voluntarily, free of inducement or coercion, having knowingly and intelligently waived his right to remain silent. *Miranda* v. *State of Arizona,* 348 U.S. 436 (196); *Mallory* v. *Hogan,* 378 U.S. 1 (1964).

In the instant case, the State's case against Meyer rested almost entirely on the two statements obtained on October 8, 1977, supported only by an uncertain identification made by twelve (12) year old Darlene Brown. Absent a showing that Meyer's conviction was founded on two voluntary statements, no other independent basis for his conviction exists. Petitioner maintains that the State did not carry this burden of proof with

regard to establishing the voluntariness of the statements and now seeks review of his conviction in light of the failure of his previous counsel to raise this issue.

In the instant case, consideration of any single instance of police conduct may not in itself appear to justify the conclusion that Meyer's statements were involuntary. Yet the entire sequence of events that transpired on October 8, 1977, taken as a totality, evidences a disturbing pattern of police coercion directed at extracting a confession from Meyer.

From the moment Meyer was first arrested on October 8, 1977, he was continuously held in a position of helplessness and isolation. Detective Hatfield did not serve Meyer with a copy of his arrest warrant, either upon arrest or anytime thereafter, despite the requirements of Maryland District Rule 720 (f) and Rule 720 (e), Maryland Rules of Procedure. These rules provide that the accused is to be served a copy of the warrant "as soon as possible after the arrest", Maryland District Rule 720 (f).

If Meyer had been given a copy of his warrant, he could have learned the nature of the State's case against him without depending on the police. Officer Hatfield made much of Lon Lewis' confession in his initial exchanges with Meyer, and offered to read the confession through with Meyer soon after Meyer's arrest. Yet Meyer need not have depended on Hatfield to provide the statement if he had been served a copy of his warrant, attached to which was a copy of the Lewis confession. Hatfield, however, used the Lewis confession as a means of inducing Meyer to make incriminating statements. Hatfield testified that he took Meyer immediately to an interrogation room at B.C.I. to read through Lewis' confession with Meyer, allegedly on Meyer's request. The entire environment, however, was fashioned to create a psychological dependence in Meyer directed at inducing him to make a confession. According to his own testimony, Hatfield repeatedly interjected questions during his reading of the Lewis confession. This situation was certainly the "functional equivalent" of an interrogation, during which

the accused is entitled to the protection of his constitutional rights against coercive police practices, no matter how veiled, *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); *Brewer* v. *Williams*, 430 U.S. 387 (1977).

Mr. Meyer was held in interrogation with only brief interruptions for approximately nine hours before he was taken before a District Commissioner for formal charging as required by Maryland District Rule 723. The language of this provision, however, clearly demands that the accused be so charged before a judicial officer without unnecessary delay. The Court of Special Appeals held in its decision in *Meyer* v. *State*, 43 Md. App. 427 (1979), that the delay in this case did indeed constitute an "unnecessary delay" and it was therefore error to admit the first statement because it was obtained in violation of Maryland District Rule 723. *See also, Johnson* v. *State*, 282 Md. 314 (1978). The admission of the statement made by Meyer during that morning's interrogation was not held not to constitute error only because its admission was held "harmless." Yet the Court, in emphasizing the first statement's largely exculpatory character, ignores the holding in *Miranda*, supra, followed in Maryland cases, that for purposes of admissibility, no distinction may be drawn between inculpatory statements and one allegedly exculpatory. e.g.: *Law* v. *State*, 21 Md. App. 12, affd after remand 29 Md. App. 457 (1974).

The Court of Special Appeals stated that their second statement provided a sufficient basis for concluding that the evidence against Meyer was "overwhelming", which thus made the admission of the first statement harmless. Such evidence as "expert testimony concerning the nature of the wounds on the victims' bodies and the strength required to inflict such wounds" was cited to reinforce the Court's position that the evidence against Meyer was "overwhelming". This approach places the cart before the horse, in that the Court used the later statement to justify the admission of the earlier one, even though his day-long interrogation, including the earlier statement was an im-

portant and crucial factor in his making that second statement. It is established that even if the truth of a confession is shown independently, the confession is inadmissible if it was obtained in violation of the Defendant's rights. *Blackburn* v. *Copinger*, 300 F. Supp. 1127 (D. Md. 1969). Similarly, admission of the earlier statement cannot be justified by the Court's belief that Meyer's guilt was established outside of the morning statement. Admitting the earlier statement on the strength of the later statement ignores the central question of the voluntariness of either and overlooks the importance of the morning's events in the daylong pattern of coercion.

The Court of Special Appeals based its decision to affirm the admission of Meyer's evening statement on its interpretation of Maryland District Rule 723 and *Johnson* v. *State* 282 Md. 314 (1978). The evening statement was held admissible as the product of an "independent act" and "deliberate reflection" and thus not tainted by the earlier violation of Maryland District Rule 723 and improper interrogation. Again, the crucial issue for the present centers on the voluntariness of the evening statement and Meyer's alleged waiver of rights. The State was never required to carry the burden of showing that Meyer's alleged waiver of rights was voluntary.

It is well established that a heavy burden rests on the State to demonstrate that a defendant held incommunicado for a period of interrogation waived his privilege against self-incrimination, knowing and intelligently. *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

The Supreme Court has further made clear that a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that the confession was in fact eventually obtained. *Miranda* 384 U.S. at 475. Meyer was held incommunicado throughout the day, and the only evidence of the State could offer to establish any voluntary waiver on Meyer's part was the uncorroborated testimony of Officers Hatfield and Morrissette.

Opposed to the State's position is the uncontroverted

testimony of Mr. Meyer that he asked his wife to get him his lawyer, the uncontroverted fact that the police refused to allow Mrs. Meyer to see her husband at any time, and the uncontroverted testimony describing the pattern of misinformation which prevented Mr. Martin, the attorney, from meeting with Meyer. Further, police testimony admitted that Meyer was returned to the Bureau of Criminal Investigations after his brief appearance before the District Commissioner for the express purpose of further interrogation, contrary to the Commissioner's Commitment Order. The Court in *Epps* v. *Levine*, 457 F. Supp. 561, 567 (4th Cir. 1978) held that "under Maryland law a person accused of a crime has (1) a right to have the state court with jurisdiction over him . . . determine . . . to whose custody he will be committed if pre-trial release is not available, and (2) a right to remain in the custody of the designated officer until further Court order."

The fact that Meyer signed certain papers before Commissioner O'Brien and evidently did not register any protest is not dispositive of the waiver issue. The accused in *Miranda* had signed a written waiver of rights something Meyer never did yet the Supreme Court found it to be an invalid waiver of his rights as it was not a "knowing and intelligent" waiver. *Miranda*, 384 U.S. at 475. The circumstances of Meyer's exceedingly brief meeting with O'Brien hardly warrants a presumption of an informed broad waiver of rights. Lasting no more than ten (10) minutes, O'Brien read Meyer the charges and informed him of certain rights, particularly those regarding the availability of public counsel. O'Brien himself testified that it would have taken him over an hour to read and fully understand the charging document that Meyer signed.

An appellate court, in considering the voluntariness of the Defendant's statements, is not bound by determination of the trial judge or jury. The constitutional concerns of due process and the privilege against self incrimination subject the issue of a confession's admissibility to independent judicial review. *Haynes* v. *Washington*, 375 U.S. 511, 515 (1961).

The Court of Special Appeals in *Meyer* v. *State*, 43 Md. App. 427, 432 at fn. 4 (1978) did not review this issue, nor was it properly placed before the Court of Appeals. While the prior appellate proceedings had focused upon the delay of presentment issue as interpreted in *Johnson* v. *State*, supra, the fundamental issue of the voluntariness of Meyer's statements and the violations of his constitutional privilege against self incrimination should now, all too belatedly, form the focus of judicial review. The fact cannot be ignored that Meyer's statements constituted almost the entire case against him; the other evidence taken alone could never support a conviction.

II. THE PETITIONER WAS DENIED HIS RIGHTS TO ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS DURING THE UNREASONABLY LONG AND UNLAWFUL DETENTION FOR PURPOSES OF INTERROGATION.

Following Meyer's arrest his wife, accompanied by her mother and two friends, waited unsuccessfully to see Meyer. Mrs. Meyer then contacted an attorney, who instructed an associate, David Martin, to contact Meyer immediately. Martin visited the Prince George's Bureau of Criminal Investigations (BCI) in Forestville, Maryland. He was told that Meyer had been transferred to the Prince George's County Detention Center. Martin went to the detention center whereupon it was disclosed to him that Meyer was still at BCI. As discussed in the statement of facts Martin first called BCI at approximately 6:30 p.m. to speak with Meyer and identify himself as Meyer's attorney. Due to the misinformation which had been supplied to him by the police and county agents, Martin was unable to meet with Meyer until after 10:30 p.m. at the County Detention Center.

Although the evidence at the pre-trial suppression hearings was conflicting the trial judge ruled that Meyer had voluntarily waived his *Miranda* rights to have an attorney present during his

interrogation. The Maryland Court of Special Appeals affirmed this finding in *Meyer v. State*, 43 Md. App. 427 (1979). However, neither the Court of Special Appeals in that opinion, the post-conviction opinion by the Honorable James Taylor of the Prince George's County Circuit Court, nor the Court of Special Appeals of Maryland opinion refusing to grant Meyer's Application for Leave to Appeal Judge Taylor's findings addressed the issue raised respecting police officials' failure to inform Meyer that an attorney was seeking to discuss Meyer's arrest with him.

Among Constitutional safeguards are the right to remain silent, that any statement the Defendant makes may be used against him, and that the Defendant has a right to the presence of counsel. These rights may be waived if the waiver is voluntary, knowing, and intelligent. However, if the Defendant indicates in any manner that he wants the presence of an attorney, all questioning must cease. *Miranda,* supra, at 444-445; *Michigan* v. *Mosley,* 423 U.S. 96 (1975).

This principle was again reaffirmed i the recent case of *Edwards* v. *Arizona,* 451 U.S. 477 (1981) in which this court stated that where a defendant asserts his right to counsel that defendant may not be reinterrogated unless he freely and voluntarily initiates the further communication, exchange, or conversation with the police.

Clearly the rationale behind the above-cited opinions centers on the right of a defendant to be free from coercion and to protect the defendant from being pressured into making inculpatory statements under pressure. Therefore, once the request for counsel is made, it is improper for the police authorities to continue interrogation unless the defendant initiates the communication. Otherwise, any statement made by the defendant without having had access to counsel does not amount to a valid waiver of his right to counsel and is hence inadmissible. *Edwards,* supra, at 487. See also, *Oregon* v. *Bradshaw,* ____ U.S. ____, 51 L.W. 4940 (1983).

Even assuming, arguendo, that the several conflicts between the police officers and the Petitioner in the testimony presented at the pre-trial suppression hearings concerning the treatment of Meyer by the police and the Miranda rights are resolved in favor of the State, *Meyer* v. *State*, 43 Md. App. at 432, fn. 4, the issue remains that where a suspect does not know that an attorney who has been retained to represent him is actually in the police station seeking an opportunity to render legal assistance and the police do not inform the suspect of that fact then there can be no intelligent and knowing waiver of Miranda rights.

Recent case law has held that a suspect who may be indifferent to the usual abstract offer of counsel recited as part of the Miranda warning would not necessarily disdain a chance to consult a lawyer who is waiting to see him then and there. *Weber* v. *State*, 457 A.2d. 674 (Del. 1983); *State* v. *Haynes*, 602 P.2d 272 (1979); *State* v. *Mathews*, 408 So. 2d 1274 (La. 1982). As was stated in *Weber*, supra, the rights established by Miranda were designed to eliminate some of the more outrageous interrogation methods employed at that time. Not only did police resort to physical violence to obtain incriminating evidence, but a variety of psychological tactics were used including isolation of the suspect and deception. *Miranda*, at 445-58. To allow the police to use tactics which prevent or forestall a suspect from exercising his rights is inconsistent with the clear purpose of Miranda. *Weber*, supra at 685; *Commonwealth* v. *McKenna*, 244 N.E. 2d 560 (Mass. 1969); *Commonwealth* v. *Hilliard*, 370 A.2d 322 (Pa. 1977).

The State court decisions cited in *Weber*, supra, suggests that the police tactic of preventing an attorney from seeing a client he is seeking to visit is incongruous with the concept of a knowing and intelligent waiver.

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these cir-

> cumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. *Miranda,* at 476.

These state court decisions have forged a rule which effectuates the protection given to the accused by *Miranda* and its progency. If prior to or during custodial interrogation, and unknown to the suspect, a specifically retained or properly designated lawyer is actually present at a police station seeking an opportunity to render legal advice or assistance ot the suspect, and the police intentionally or negligently fail to inform the suspect of that fact, then any statement obtained after the police themselves know of the attorney's efforts to assist the suspect, or any evidence derived from an such statement, is not admissable on any theory that the suspect intelligently and knowingly waived his right to remain silent and his right to counsel as established by *Miranda. Weber,* supra, at 686, and cases cited therein. Where an attorney presents himself at the police station or other site of interrogation the police may not ignore or refuse to communicate with that attorney who is seeking to assist his client. This rule should apply whether the attorney was retained by the suspect or by a third party acting on behalf of or for the suspect. *Id.*

In the instant case the record reveals that Mrs. Meyer retained an attorney who sent his partner to meet with Meyer at BCI. Although the police were well aware, as early as 6:30 p.m. on the day of the arrest that the attorney was attempting to meet with Meyer, the attorney was wrongfully misinformed repeatedly as to Meyer's whereabouts. The attorney was not able as a result of the police diversion to meet with Meyer until over four hours after his initial attempt to contact Meyer.

It is highly significant that Meyer never signed a waiver form following the taking of his first statement. Nor did Meyer sign a formal waiver of his rights after being taken before the District Commissioner. Finally, after a second statement was taken from Meyer he was given a written waiver of rights to sign, which he once again refused to sign. The police officer who prepared the typed statement was instructed to ask Meyer whether or not he had been advised of his constitutional rights by the Commissioner, Meyer replied that he did not remember being so advised.

III. THE PETITIONER DID NOT WAIVE ANY RIGHT TO APPEAL THE ISSUES OF THIS PETITION BECAUSE OF INADEQUATE REPRESENTATION BY THE PUBLIC DEFENDER IN THE APPEAL OF THE CIRCUIT COURT CONVICTION

At his trial in April, 1978 Meyer's defense focused on (a) his contention that statements that he made to the police were involuntary and were therefor inadmissable as a tainted product of an illegal detention, and that he was denied his rights under *Miranda* v. *State of Arizona,* 384 U.S. 436 (1966), and (b) that the actions of the police denied him the right of the assistance of counsel as guaranteed by the United States Constitution.

Meyer also argued that the police had not properly brought him before a District Commissioner for formal charging within the time restriction set for in the Maryland Rule. Maryland District Rule 723. Meyers contended that the nine-hour delay in bringing him before the Commissioner was illegal and thereby tainted both of the two statements he gave the police that day. *Johnson* v. *State,* 282 Md. 314 (197. Finally, Meyer contended that both the in-court and out-of-court identification of him by a witness was impermissably suggestive and therefore inadmissable.

Meyer was unsuccessful on all of these arguments and was convicted of the first degree murder of Carole Lewis and the second degree murder of her daughter, Heather. On appeal, Meyer's case was handled by the Maryland Public Defenders' Office. The issues of the voluntariness of Meyer's statements and the denial of counsel during interrogation were not raised on appeal by his counsel. The Public Defender focused its appeal on the alleged violation of Maryland District Rule 723 and the delay in bringing Meyer before the Commissioner, along with the question of the admissability of the witness' identification of Meyer.

The Maryland Court of Special Appeals affirmed the conviction in *Meyer* v. *State*, 43 Md. App. 427 (1979). In that reported opinion the court noted in a footnote that "at the trial the jury also heard the conflicting testimony concerning the treatment of the Appellant by the police. We note that the Appellant does not, on appeal, challenge the voluntariness of his statements or the adequacy of his waiver of his Miranda rights." *Meyer*, supra, at 432. In fact, Meyer had directed his Public Defender by letter to raise the issue on appeal of the prevention by the police of his attorney's repeated efforts to see him during his interrogation. (App. A). However, he was informed by the Public Defender that she had chosen to drop the issues on appeal, viewing them as unwinable or "credibility" issues. (App. B).

Furthermore, the Public Defender did not confer with Meyer before preparing a filing his Brief to the Court of Special Appeals. She met with Meyer for the first time to discuss what issues were to be raised on appeal the day *after* the Brief was filed. The Affidavit filed in support of Meyer's Petition for Post Conviction Relief in Maryland established that Meyer did not waive those two critical issues on direct appeal and that his Public Defender decided, *sua sponte*, not to raise those issues. (App. E)

The rights of the criminal defendant were extended in the Landmark decision in *Anders* v. *California*, 386 U.S. 738 (1967)

wherein the Supreme Court stressed that a defendant's counsel must act in the role of an active advocate on behalf of his client and that he must support his client's appeal to the best of his ability.

In the reent case of *Barnes* v. *Jones,* 665 A 2d 427 (2nd. Cir. 1981) the Court of Appeals for the second circuit discussed *Anders,* supra, and quoting from *High* v. *Rhay,* 519 F.2d. 109 (9th Cir. 1975) noted that where an appellant urges his attorney to make a non-frivolous argument, "appointed counsel . . . has a duty under *Anders* not only to raise such a non-frivolous or colorable points an to admit the frivolous arguments. Alternatively, as indicated by the ABA Standards, Criminal Appeal, Section 3.2 (1970), commentary d at 79, the appellate counsel may include the frivolous question in his Brief but deal with it sketchily.

However, it is crucial to stress that *Anders,* supra, compels the appointed attorney to argue non-frivolous appeals at the defendant's request. The Public Defender's judgment that the appellant is unlikely to prevail on the merit of his non-frivolous arguments is no substitute for an active advocates presentation of those arguments to the appellate court. *Anders,* supra; *Barnes,* supra, at 433.

> "Thus appointed counsel's unwillingness to present particular arguments at Appellant's request functions not only to abridge Defendant's right to counsel on appeal, but also to limit the Defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial – the very right that an appointment of appellate counsel was designed to preserve." (case citation omitted).

The decision to forego potentially meritorious issues on appeal requires as much client input as does the decision whether to appeal in the first instance. In *Barnes,* supra, at 435 the Court quoted *Ennis* v. *LeFevre,* 560 F.2d 1072, 1077 (2d. Cir. 1977), cert. denied, 435 U.S. 976 (1978): "Whether to raise an issue, if a serious [one] may perhaps may not be left entirely to the

lawyer's decision." The court in *Barnes,* supra, noted that the Code of Professional Responsibility recognizes that the authority to make decisions is often times exclusively that of the client and that "the lawyers should always remember that the decision whether to forego legally available objectives or methods because of non-legal legal factors is ultimately for the client and not for himself." EC 7-8. In this sense the functions and duties of assigned defense counsel do not differ from those of retained counsel.

In the instant case, Meyer wrote to his assigned attorney and requested that certain issues be raised on appeal. However, his attorney chose to disregard those requests and disregard the issues of whether Meyer's statements were voluntary, whether his waiver of Miranda rights were voluntary, and the issue of whether or not his counsel was denied the opportunity to meet with him when so requested. Those issues are certainly "colorable claims" which should not have been totally abandoned by his Public Defender, especially after Meyers requested that those issues be addressed on appeal.

Case law indicates that once a defendant demonstrates that his appointed counsel failed to argue colorful claims at his request, that defendant need *not* also demonstrate a likehood of success on the merits of those claims. *Barnes,* supra, at 434, quoting *High,* supra, at 113. See also, *Robinson* v. *Wyrick,* 635 F.2d 757 (8th Cir. 1981); *Horsley* v. *Simpson,* 400 F.2d 708 (5th Cir. 1968).

As was stated in *Miller* v. *McCarthy,* 607 F.2d 854 (9th Cir. 1979), under the *Anders,* supra, case a defense counsel may not "sabotage his client's appeal by inaction even if he thinks it without merit." at 857. In *Miller,* supra, the attorney failed to meet with the Defendant to discuss an appeal despite the Defendant's continued request that he do so. Similarly in *U.S.* v. *Neff,* 525 F.2d 361 (8th Cir. 1975), the court noted that if an attorney failed to carry out his client's express instructions to appeal or fails to see that client is informed of the appeal, the client is demed without the effective assistance of counsel. The

counsel should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable result of appeal. But the decision whether to appeal must be the defendant's own choice.

Similarly, under the *Anders* doctrine the decision to raise colorable issues on appeal should also be left to the defendant and not ignored by his appellate counsel. Compared, *Telesco* v. *Scully,* 541 F.Supp. 822 (D. N.Y. 1982) wherein unlike in the instant case the Defendant did not allege that he requested that a certain claim on an appeal be raised.

IV. THE EXCLUSION OF THE PETITIONER FROM A BENCH CONFERENCE DURING A COMMUNICATION FROM THE JURY VIOLATED HIS RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIALS AS GUARANTEED BY THE U.S. CONSTITUTION.

Following the conclusion of his instructions to the jury in the April, 1978 murder trial, the trial Judge received a note from the jury foreman requesting copies of Maryland Rule 723, the other laws cited by counsel during trial, and the transcript of testimony. The Court called the opposing counsel to a bench conference during which he recited the jury's request and informed them of his decision to deny it. Meyer's attorney did not object or question the ruling despite the fact that Meyer's case relied, to a great extent, on a proper and accurate application of Maryland Rule 723. The text of this Rule had been read by the Court to the jury in its instructions, at which time the judge informed the jury that it was their responsibility to find the proper law in the case and apply the facts to it. This unique role of the jury, as the trier of both fact and law under Maryland law, necessitated a clear understanding of the applicable law at issue. A copy of statutes recited and Maryland Rule 723 may have better aided the jury in attaining accuracy in its deliberations than reliance on their memory. It is undisputed that it is within discretion of the judge to regulate what items are allowed into

the jury room during deliberation of the judge to regulate what items are allowed into the jury room during deliberation. Refusal of the jury's request, however, hampered their ability to assess Meyer's claim that the improper delay in his presentment before a judicial officer made his statements inadmissible.

The right of a criminal defendant to be present at every stage of his trial is a common law right preserved by Article 5 of the Maryland Declaration of Rights, and in some measure by the 14th Amendment of the U.S. Constitution, *Faretta v. California* 422 U.S. 806 (1965); *Bunch v. State* 281 Md. 680 (1980); *Brown v. State* 272 Md. 450 (1974). This right is additionally guaranteed by Maryland Rule 724 which provides that "the Defendant shall be present at every stage of the trial... except as provided by these Rules". The pertinent exception concerns any "conference or argument on a question of law". Maryland Rule 724(b)(1).

Maryland case law has attempted to distinguish between those events covered by the Rule and those not considered a "stage of the trial". Thus, procedural questions discussed during a recess, and discussions on the law regarding a directed verdict have been held not to require the presence of the defendant. *Brown v. State* 272 Md. 450 (1974); *Martin v. State* 228 Md. 311 (1962). The controlling principle possible was best expressed in *Hughes v. State* 288 Md. 261, 224 (1980), which quoted approvingly Justice Cardoza's opinion in *Snyder v. Massachusetts* 291 U.S. 97 (1934). The defendant's right to be present at his trial extended, Cardoza stressed, to "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Hughes v. State* 288 Md. at 224. To sustain Meyer's contention that his exclusion from bench conferences at his April 1978 trial violated his rights and constituted reversible error, "it must be shown (a) that the bench conferences were stages of the trial at which (Meyer) had a right to be present, (b) that (Meyer) was not, in fact, present, and (c) that (Meyer) did not waive his right to be present." *Haley v.*

State 40 Md. App. 349 (1978). In the instant case, all three elements are found.

Considering the first element in establishing a violation of the Defendant's rights cited in *Haley,* communications between the judge and jury concerning their instructions certainly qualify as a "stage of the trial" at which a Defendant has a right to be present. The Court of Appeals of Maryland in *Porter v. State* 289 Md. 349, 353 (1979) observed that "whether a particular event occurred during a stage of the trial ordinarily involves a consideration of *when* an event occurred and *what* was involved." The bench conference in question occurred at a critical stage of the trial, and involved a matter of importance to Meyer's defense. Issues which involve communications with the jury "relating to their verdict" have been held to constitute stages of the trial when the Defendant has a right to be present with the exception of issues of procedure or questions of law, *Bunch v. State* 281 Md. at 634. The Court of Appeals of Maryland was quite clear on this point in *Midgett* v. *State* 216 Md. 26, 36 (1957):

> In this state there is no doubt than an accused in a criminal prosecution for a felony has an absolute right to be present at every state of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right. The Constitutional guarantee includes the right of the accused to be present (i) when the jury is charged or instructed on the facts, the law or form of the verdict, before it has begun its deliberations or afterwards upon its request or by direction of the Court; (iii) when the Court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the Court and the jury; unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.

The communication between the court and the jury in Meyer's trial was certainly a "stage of the trial" involving "questions propounded by the jury" which could well have had a "tendency to influence the verdict of the jury". Meyer had a right to be present during all jury instructions, including those which are initiated at the jury's behest.

With regard to the presence or absence of Meyer at the bench conference during his trial, the trial transcript does not indicate his presence, noting only that "Counsel approached the bench".

> (At 1:45 o'clock, p.m., trial in the above-entitled matter was resumed.)
>
> THE COURT: Gentlemen, come up, please.
>
> (Whereupon, counsel approached the bench and the following conference was had, the jury not being present.)
>
> THE COURT: At the luncheon recess, the foreman inquired whether he could ask me a question. I said to put it in writing.
>
> The question is: "Can we have copies of the law regarding defendant's rights re: 723, any laws read to us by attorney. Three, the testimony."
>
> I am putting this in the Court's file and will tell the jury foreman the answer to the inquiry is "No."
>
> Let's go.
>
> MR. DePAUL: Thank you, Judge.
>
> (Whereupon, counsel returned to trial table and the jury took their place in the jury box, after which the following proceedings were had in open court:)
>
> THE COURT: All right. Mr. Sauerwein, before you proceed, sir, Mr. Dunn, in regard to the note that you gave me during the luncheon recess, the answer to your question is "No."
>
> THE FOREMAN: Thank you.
>
> THE COURT: All right. Mr. Sauerwein, you may proceed.

Unless the record is clear in affirmatively indicating that the defendant *was* present, the court cannot presume his presence from a silent record. Rather, the court must require, as a matter of State procedure, "that the complete facts be brought out in post conviction procedures". *Haley v. State* 40 Md. App. 349, 354 (1978); *Green v. State* 23 Md. 680 (1974). *See also State v. Zimmerman* 261 Md. 11 (1973).

Similarly in *Shields* v. *U.S.*, 273 U.S. 583 (1972), the Supreme Court held it was reversible error for the trial judge without giving notice to the defendant to send a written instruction to the jury.

The right of the defendant to be present at every critical stage of the trial is personal to him and cannot be waived by his counsel. *Porter* v. *State* 289 Md. 349 (1981); *Bunch* v. *State* 28 Md. 680; *Midgett* v. *State* 216 Md. 26; *Haley* v. *State* 40 Md. App. 349. The record does not indicate whether Meyer was aware of what transpired during the bench conference, let alone waived his right to be present under Rule 724. As with the issue of actual presence of the defendant, a silent record cannot create a presumption of waiver, but must be determined in post-conviction procedures. *Haley* v. *State* 40 Md. App. at 355; *Nobel* v. *State* 46 Md. App. 154 (1980). Likewise, the fact that Meyer's public attorney chose, contrary to Meyer's expressed wishes, not to raise this issue on appeal cannot be construed as a waiver on Meyer's part. *Noble* v. *State* 46 Md. App. 154, 159 (1980). The court recently reaffirmed this position on waiver in *Noble* v. *State*, No. 8a Md. Court of Appeals 7, filed June 7, 1982, by holding that "under a long line of cases in this Court, an effective waiver of the right to be present must be done by the defendant *personally* and must be done *expressly*. *See Williams* v. *State* 292 Md. 201; *Porter* v. *State* 289 Md. 353 (1981); *Bunch* v. *State* 281 Md. 680 (1978). Any modification of the right as announced in *Williams* v. *State* is to apply *prospectively* only. *Williams* v. *State* 292 Md. at 220. Thus any waiver of Meyer's right to be present at all stages of his trial must be shown to have been made personally and expressly by him.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Special Appeals in Maryland and reverse the judgment of the lower court denying Petitioners' Petition for Post Conviction Review.

Respectfully submitted,

JOHN T. BELL
(Counsel of Record)
BELL, CORNELIUS & SHORE
101 West Jefferson Street
Rockville, Maryland 20850
Attorney for Petitioner

APPENDIX A

11/6

Dear Ms. Sweeney

I have just come from a meeting. To my astonishment I have discovered that the Public Defender's office did not appeal the Court's decision of admitting the statements into the case. As you are aware I specifically requested you to appeal both these points:

> The point of the refusal of the Police to allow my attorney to meet with me, as well as the Point of the Police threat of force and the other things that happened to me!

Whatever are you trying to do to me!

Mr. Seekford tells me that if my mother hires him the the Public Defenders Office may want the transcript to be paid for! I can not pay for the attorney except through my mother, my mother can not pay for both the attorney and the transcript. Please do not charge for the transcript so that I may have Mr. Seekford represent me.

I would like for you to turn over the transcript of the entire proceedings and all the appeal papers to him so that he may continue the appeal, as you know I am still indigent and could not hire an attorney by myself.

You always said you wanted to help me!

Respectfully,

Gene T. Meyer

APPENDIX B

OFFICE OF THE PUBLIC DEFENDER
8TH FLOOR
EQUITABLE BUILDING
BALTIMORE, MARYLAND 21202
TELEPHONE: 333-3050

ALAN HAMILTON MURI
PUBLIC DEFENDER

MARVIN MANDEL
GOVERNOR

ALFRED A. O'FERRALL II
DEPUTY PUBLIC DEFENDER

• • •

[Rec. 11/13/79]

November 9, 1979

Gene T. Meyer, #4495
Post Office Box 700
Jessup, Maryland 20794

Dear Mr. Meyer:

I have received your letter of November 6, 1979. I am sorry that you are upset, and I believe at least some of this is due to a misunderstanding, so let me try to straighten it out.

First, I told Mr. Seekford that I did not know whether or not our office would require him to pay for the transcript, and suggested that he call Dennis Henderson, who handles such administrative details, in order to find out. He apparently had not done so before he talked with you on November 6. He has now done so, and Mr. Henderson told him that we would lend him the transcript at no cost. Your mother will not have to pay for the transcript. I had told Mr. Seekford before, and I will tell you, that I will be happy to co-operate with him in any way I can, and that my file is open to him.

Secondly, I am surprised at your astonishment as to what issues were raised in the Court of Special Appeals. I believe we discussed this when I met with you at the Maryland Penitentiary on November 9, 1978. I subse-

quently sent you a copy of the brief so that you would see exactly what issues were raised. It was my belief, at the time of our initial interview, and it is still my belief today, that your contention that the police threatened you and refused to allow you to see an attorney was a credibility issue which the trial court decided against you, and which was therefore, unappropriate for appellate review. I believe I told you at that time that I would include these facts in the brief, but not make a specific issue of it because I did not think that we could win on it as a separate issue. Mr. Seekford may now have a different opinion, and you and he may pursue it, but I don't think I have misled you, and I don't think I have injured your cause.

I understand that you are upset. It is upsetting to think that a lawyer you relied on was not looking out for your best interest. Rest assured that that is not true. I have done everything I could for you. I did try to help; I am not now trying to do otherwise. I hope Mr. Seekford will be able to convince the court to give you the relief you want.

Good luck in the future proceedings.

Sincerely,
/s/ Geraldine Kenney Sweeney
Geraldine Keeney Sweeney
Assistant Public Defender
Appellate Division
383-6123

GKS/es

I do not know if you got a copy of this but I have the envelope from 11/8/78 postmark – that I received the Public Defenders Brief in!

The brief was mailed to me before she saw me! The brief was printed up and mailed before she came to discuss the case!

APPENDIX C

Appeal from the Circuit Court for Prince George's County (Levin, Jacob S.J.).

Gene Thomas Meyer was convicted in a jury trial of first degree and second degree murder and from judgments entered thereon, he appeals.

Judgments affirmed; cost to be paid by appellant.*

The cause was argued before Morton, Moore and Lowe, JJ.

Geraldine Kenney Sweeney, Assistant Public Defender, with whom was *Alan H. Murrell, Public Defender,* on the brief, for appellant.

Kathleen M. Sweeney, Assistant Attorney General, with whom were *Francis Bill Burch, Attorney General, Arthur A. Marshall, Jr., State's Attorney for Prince George's County,*and *Joseph C. Sauerwein, Deputy State's Attorney for Prince George's County,* on the brief, for appellee.

Moore, J., delivered the opinion of the Court.

A mother and her three-month old infant were stabbed to death in their Bowie, Maryland home. Appellant, Gene Thomas Meyer, was convicted of first degree murder of the mother and second degree murder of the child and received sentences of life imprisonment and thirty years, to be served consecutively. On this appeal, the major issue prsented involves Maryland District Rule 723 (M.D.R.) requiring an arrrested person to be presented "without un-

*Note: *Certiorari* denied, Court of Appeals of Maryland, December 20, 1979.

necessary delay" before a judicial officer. Appellant, relying upon *Johnson v. State,* 282 Md. 314, 384 A.2d 709 (1978), contends that two statements obtained from him by the police should have been suppressed as products of an unnecessary delay in presenting him before a District Court Commissioner. In opposition, the State argues: that *Johnson* should only be applied prospectively to arrests occurring after April 6, 1978, the date of the decision; and alternatively, that the delay in presentment was necessary, that the admission of the first statement, if erroneous, was harmless; and that the second statement was a product of deliberate reflection.

Appellant has also challenged an in-court identification allegdly made under "impermissibly suggestive circumstances;" the introduction of allegedly inflammatory color photographs of the crime scene and of the autopsy; the admissibility of opinions contained in the autopsy reports; the seizure of his automobile in Virginia by Prince George's County (Maryland) Police; and a jury instruction containing a reference to "probable cause." Finding no reversible error, we shall affirm.

I

The record of the suppression hearings discloses that, on September 23, 1977, Lon Alec Lewis, after finishing work, returned to his home in Bowie and found, in the kitchen, the bodies of his 27-year-old wife, Carol, and 3-month old baby, Heather. He summoned help from a neighbor, and the police were called. Both Carol and Heather had been the victims of an assailant who had brutally stabbed them to death with a knife.

Over the next two weeks, Lon Lewis fully cooperated with the police. He permitted them to search his home and

consented to being interviewed. During the course of those interviews, Mr. Lewis admitted having a girlfriend in Texas who had been communicating with him by letters mailed to Mr. Lewis at the address of appellant, Gene Meyer. On October 6, 1977, a Prince George's County police officer visited the appellant at his Rockville, Montgomery County, apartment to obtain any of the Texas girlfriend's letters that Mr. Meyer might have been holding for Mr. Lewis. Although Mr. Meyer did not have any letters, he was interviewed, and a written statement was taken in which he discussed Mr. Lewis' Texas liaison. Mr. Meyer stated that he learned of Mr. Lewis' girlfriend when he and Mr. Lewis had spent a week in Texas attending a training program sponsored by their employer.

The next day, October 7, 1977, Lon Lewis was further questioned by the police. Early in the evening he admitted his complicity in the murders of his wife and child and was arrested.[1] Over the next few hours he gave a writtten statement to the police describing in detail an agreement between himself and Mr. Meyer in which the murders of their wives had been planned.

Acting upon this information and the description provided by a witness who saw a man approaching the Lewis house shortly before the murders were committed, the police obtained a warrant for the arrest of the appellant. At 7:15 a.m., on October 8, 1977, Mr. Meyer was arrested

[1]After the trial of the appellant herein, Mr. Lewis was tried and convicted as an accessory before the fact to the murders for which the appellant has been convicted as the principal. Mr. Lewis' conviction was recently reversed by the Court of Appeals, and the case was remanded for a new trial. Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979).

at this apartment in Rockville, handcuffed, placed in the back seat of a police cruiser, and given his *Miranda* warnings.[2]

Detective David Hatfield, who rode in the police cruiser during the trip to the Bureau of Criminal Investigation (BCI) in Forestville, Prince George's Cunty, from Rockville, testified at the pretrial suppression hearing and described appellant's reaction when told of the Lon Lewis statement. Mr. Meyer wanted to see the Lewis statement and told Detective Hatfield that the police would have to "prove it" because it was Mr. Lewis' word against his.

Upon arriving at BCI, the appellant was placed in an interrogation room, unhandcuffed, and offered some coffee. Detective Hatfield obtained the Lewis statement, and together the two men spent almost two hours reading the 14-page typed and handwritten document. Detective Hatfield testified that Mr. Myer, after reading the statement, offered to tell his side of the story: "[H]e said he would give a truthful response."

Over the next six hours, until shortly before 4 p.m., Mr. Meyer gave a statement which was transcribed by Detective Hatfield. In this statement (the first statement) the appellant denied any involvement in the murders. Instead, he blamed Lon Lewis, stating "When I heard the news that she got killed I figured he did it or got someone to do it." Appellant also expanded upon his previous discussion of the Lewis Texas tryst, and he admitted being at the Lewis home on Thursday, September 22, 1977, the night before the murders. He also acknowledged owning a cream-colored suit and a briefcase.

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

After giving this first statement, the appellant was transported to Upper Marlboro from BCI and presented before Districtd Court Commissioner Michael J. O'Brien at 4:15 p.m. The Commissioner certified that he informed the appellant of his rights set forth in the charging document,[3] and the appellant similarly signed an acknowledgment of receipt of such rights.

On the trip back to BCI from the Commissioner, Mr. Meyer indicated that he was hungry. A steak dinner was purchased, and the appellant ate his dinner back at BCI in an interrogation room. Detective Corporal Michael K. Morrissette was present while the appellant had dinner, and according to Corporal Morrissette's testimony he engaged the appellant in general conversation, discussing his upbringing, background, job, and marriage.

At 6 p.m., Corporal Morrissette read the *Miranda* warnings to the appellant. He orally waived his rights and expressed a willingness to talk to the police. During the next three hours, the story gradually unfolded. The appellant admitted killing 3-month old Heather, but stated that it was an accident. He also confessed to the stabbing of Carol Lewis. At 9 p.m., there was a twenty-minute break during which Corporal Morrissette prepared to take a written statement from the appellant. From 9:20 to 10:00, the two men worked on a written statement (the second statement); Corporal Morrissette typed each of the four pages and Mr. Meyer signed each page at the bottom.

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[3] M.D.R. 723 (b)(2) provides that the "judicial officer shall require the defendant to read the advice of right to counsel printed on the charging document . . ." and "shall certify in writing that the defendant has read the advice as to the right of counsel in his presence . . . ." Commissioner O'Brien did make such a certiication. The contents of the advice are prescribed by M.D.R. 711 (a) and were accurately reproduced in the charging document in the instant case.

After the confession was completed, the appellant was asked to sign a written waiver of rights, but he refused. Shortly after 10:00 p.m., Mr. Meyer was transported to the Prince George's County Detention Center from BCI.

Hearings on the appellant's motion to suppress evidence, including the first and second statements, were held over a period of four days during March and April, 1978.[4] Judge Jacob S. Levin denied the motions. Trial commenced April 20, 1978 on two counts of murder in the first degree. On April 26, 1978, the jury returned verdicts finding the appellant guilty of the first degree murder of Carol Lewis and the second degree murder of Heather Lewis.

II

The appellant first urges that the trial judge was in error when he denied the appellant's motion to suppress the two statements taken after the appellant's arrest. It is his con-

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[4]There were several conflicts between the police officers and the appellants in the testimony presented at the pretrial suppression hearings. Mr. Meyer testified that the police continually called him "Crazy Man"; told him he had no rights; denied him food, the use of bathroom facilities, and access to a telephone; and hit him on the head whenever he asked for an attorney. This testimony was flatly contradicted by the testimony of Officers Hatfield and Morrissette. Judge Levin chose to believe the police officers' version. The credibility of witnesses at a pretrial suppression hearing is for the determination of the trial judge, Boone v. State, 2 Md. App. 80, 95-96, 233 A.2d 476, 485 (1967), subject to reversal only for a manifest abuse of discretion. *See* Watson v. State, 282 Md. 73, 84, 382 A.2d 574, 580, *cert. denied*, 437 U.S. 908 (1978); Smith v. State, 20 Md. App. 577, 585-86, 318 A.2d 568, 574-75 (1974), *cert. denied*, 420 U.S. 909 (1975).

At trial the jury also heard the conflicting testimony concerning the treatment of the appellant by the police. We note that the appellant does not, on appeal, challenge the voluntariness of his statements or the adequacy of his waiver of his *Miranda* rights.

tention that the police violated M.D.R. 723 by unnecessarily delaying his initial appearance before a judicial officer. Citing *Johnson v. State,* 282 Md. 314, 384 A.2d 709 (1978), he argues that the first statement should have been suppressed because it was taken prior to his initial appearance and during a period of unnecessary delay.[5] Appellant also urges us to rule that the second statement should have been suppressed for two reasons: first, the initial appearance before Commissioner O'Brien was defective because the Commissioner did not read the complete "advice of right to counsel" required by M.D.R. 723 (b); second, the statement was "tainted by the previous illegal detention," and does, therefore, fall within the *Johnson* exclusionary rule.

THE FIRST STATEMENT

In response to the appellant's argument that the period during which the first statement was taken constituted an "unnecessary delay" in bringing the appellant before a judicial officer, the State first urges us to conclude, as did the trial judge, that the nine-hour delay was necessary under the circumstances presented here. Appellee points out that the appellant had to be transported to BCI from his home in Rockville, processed, and then transported to the Commissioner from BCI; but concedes that, at most,

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[5]It may seem anomalous that the appellant is seeking to exclude a largely exculpatory statement. As we read the broad language of the *Johnson* case, it applies to "any statement" given to the police in violation of M.D.R. 723 without regard to the statement's content. *Id.* at 328, 384 A.2d at 717. We note, as did the Supreme Court that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution." Miranda v. Arizona, 384 U.S. 436, 477 (1966), *quoted in Milhouse v. State,* 31 Md. App. 571, 576, 358 A.2d 262, 265 (1976).

these events consumed a total of eighty minutes. Any contention that a period of eighty minutes establishes a necessity for a nine hour delay is patently without merit.

In *Johnson*, the Court of Appeals listed five examples of necessary delay. *Id.* at 329, 384 A.2d at 717. The examples were intended to be just that; they were not intended to be an entire litany of occurrences from which the State is required to justify a delay in the initial appearance of a defendant before a judicial officer. *Lewis v. State*, 285 Md. 705, 404 A.2d 1073 (1979).

M.D.R. 723, while allowing for necessary delays in presenting a defendant before a judicial officer, does not countenance a delay for the principal purpose of obtaining a statement or a confession from the defendant. The Maryland Rule has its antecedents in the federal *McNabb-Mallory* Rule. *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). In the latter case the Court made it plain that "the delay must not be of a nature to give *opportunity* for the extraction of a confession." *Id.* at 455 (emphasis added); *see also United States v. Meachum*, 197 F. Supp. 803 (D.D.C. 1961); *Commonwealth v. Davenport*, 471 Pa. 278, 370 A.2d 301 (1977), M.D.R. 723 is designed to insure that even a defendant arrested pursuant to a warrant is promptly brought before a neutral judicial authority who can formally apprise the defendant of his rights and ascertain his desires with regard to legal counsel.[6] *See, e.g., Watson v.*

[6]We note that the Court of Appeals in *Lewis* found a six and one-half hour delay to be necessary where its sole purpose was to transcribe a confession given by the defendant *prior* to his arrest. Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979). Of course, a totally different situation is presented where, as in the instant case, the arrest *precedes* any questioning leading to a statement or confession.

States, 234 F.2d 42 (D.C. Cir. 1956) and 249 F.2d 106 D.C. Cir. 1957).

In the instant case, Mr. Meyer was arrested at 7:00 a.m. and taken to BCI. He was informed of the existence of the Lewis statement implicating him in the murders; he requested to see the statement and then offered his own version denying any involvement in the brutal stabbings. In *Commonwealth v. Abu-Ibn Hanifah Bey,* 462 Pa. 533, 341 A.2d 907 (1975), the Pennsylvania Supreme Court held that a delay for the purpose of confronting a defendant with a statement implicating him in a robbery and taking his statement thereafter is "unnecessary" under the terms of a similar Pennsylvania rule. Here an obvious opportunity existed for the extraction of a confession after the appellant's arrest and prior to his initial appearance. It was error to admit the first statement because it was obtained in violation of M.D.R. 723.*Johnson v. State,* 282 Md. 314, 384 A.2d 709 (1978).

Upon our own independent review of the record, however, we are convinced beyond a reasonable doubt that the erroneous admission of the first statement in no way influenced the jury's verdict. The error is, therefore, harmless and reversal of the conviction is not required. *Dorsey v. State,* 276 Md. 638, 659, 350 A.2d 665, 678 (1976). *See also Chapman v. California,* 386 U.S. 18 (1967); *Harrington v. California,* 395 U.S. 250 (1969); *Fahy v. Connecticut,* 375 U.S. 85 (1963). It is of no significance that the error complained of is not of constitutional dimension, for Maryland has but one harmless error rule for criminal cases. *Dorsey, id.* at 657-59, 350 A.2d at 677-78.

In the erroneously admitted first statement, Mr. Meyer vehemently denied any involvement in the murders; he did accuse Lon Lewis of complicity in the crimes. He also expanded somewhat on the information he had previously supplied to the police concerning Mr. Lewis' Texas girlfriend.[7] Mr. Meyer did admit visiting the Lewis home the night before the murders, and he did admit owning a cream-colored suit and a black briefcase. The major portion of the first statement, however, was devoted to the appellant's denial of culpability in the crime.

The evidence in the case was overwhelming. The appellant's confession detailing the manner of the stabbings was, as we hold, *infra,* properly received into evidence. *Cf. Milton v. Wainright,* 407 U.S. 371 (1972) (erroneous admission of inculpatory statement was harmless in light of other properly admitted confessions). An eyewitness identified the appellant, both in and out of court, as the person she saw appraoching the Lewis home shortly before the murders were committed. In addition, there was independent evidence of the ownership of the briefcase: a picture of the briefcase lying on the back seat of the appellant's automobile was admitted along with the briefcase itself. Other evidence clearly linked the appellant to the crime: expert testimony concerning the nature of the

[7]The prior statement, taken two days before appellant's arrest, was admitted into evidence; the appellant does not, on appeal, challenge its admission.

wounds on the victims' bodies and the strength required to inflict such wounds; and blood found on the appellant's shoes.

The facts contained in this first statement were either cumulative of the other evidence or insignificant in light of the other evidence. Moreover, the essence of the statement was exculpatory. Its admission into evidence, while erroneous under M.D.R. 723 (a), was harmless error in this case. *See Bartram v. State,* 33 Md. App. 115, 152-56, 364 A.2d 1119, 1141-43 (1976), *aff'd,* 280 Md. 616, 374 A.2d 1144 (1977); *Holloway v. State,* 26 Md. App. 382, 395-96, 339 A.2d 319, 326-27 (1975).[8]

THE SECOND STATEMENT

Appellant first asserts that Commissioner O'Brien failed to give the appellant the full advice of right to counsel as required by M.D.R. 723 (b) as set out in M.D.R. 711 (a). This argument is based on the testimony of Commissioner O'Brien at the pretrial suppression hearing and at trial when he was asked to recite the advice given to the appellant; his testimony, while patterned on the *Miranda* warnings, did not specifically track the language in M.D.R. 711 (a).

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[8] Because of our disposition of the issues under M.D.R. 723 we do not consider the State's argument that the *Johnson* case should be applied prospectively only. Accordingly, we express no view at this time on the merits of the State's argument. *Cf.* Shope v. State, 41 Md. App. 161, 396 A.2d 282 (1979). In Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979), the same argument was addressed to the Court of Appeals but the Court in its disposition of the case found it unnecessary to decide the question.

We do not think that appellant's argument can be sustained. It overlooks the acknowledgments signed by both the Commissioner and the appellant at the initial appearance. *See* n.3, *supra.* The "advice of right to counsel" that appears on the charging document, which appellant by his signature acknowledged reading and receiving, conforms with the requirements of M.D.R. 711 (a). In light of its documentary evidence indicating compliance with M.D.R. 723 (b), the appellant's assertion premised on a mere imprecision in the Commissioner's testimony must fail.

It is also argued by the appellant that the second statement in which he confessed to the murders should have been suppressed because of the preceding illegal detention which violated M.D.R. 723 (a). Since we have found that the appellant's initial appearance before the Commissioner was unnecesasrily delayed by the police, we must focus upon the circumstances surrounding the second statement, specifically to ascertain whether it was an "independent act" and a product of "deliberate reflection." *Johnson v. State,* 282 Md. 314, 330, 384 A.2d 709, 718 (1978).

A similar situation was presented in *Johnson;* the police had taken two statements from the defendant, one prior to his initial appearance and one following the appearance. In ruling that the second statement should have been excluded, Judge Levin stated for the Court:

> "Appellant's second statement, admitting responsibility for the Rainbow Cleaners holdup and shooting, which was given almost immediately upon appellant's return from the commissioner on January 31, should likewise have been suppressed. ***We cannot say, on the record before us, that the second confession was an independent act, occurring after time for deliberate***

> *reflection and therefore free from the taint of the preceding illegal detention."*

Id. at 330, 384 A.2d at 718 (Emphasis added.)

In our judgment the State has met its burden of showing in this case that the second confession was an independent act and a product of deliberate reflection. Appellant's first statement was essentially exculpatory; he denied any involvement in the murders. In *Johnson,* the defendant "all but confessed" in the first statement, *id.* at 318, 384 A.2d at 711; in the second statement he "confessed outright." *Id.* at 318, 384 A.2d at 712. Moreover, appellant here completed his first statement at 3:45 p.m. He was then driven to Upper Marlboro from BCI, presented before Commissioner O'Brien, and transported back to BCI. During the return trip, a stop was made in order to purchase, at his request, a steak dinner.

Questioning by Corporal Morrissette did not begin until after Mr. Meyer had finished his dinner at 6:00 p.m. — almost two hours after his initial appearance before the Commissioner. The questioning lasted for three hours; there was a twenty-minute break, and then the written second statement was prepared between 9:20 p.m. and 10:00 p.m. — a period of five hours after the appellant's initial appearance. Although the appellant signed the bottom of each page of the second statement, when presented with a written waiver of rights, he declined to sign that paper, thus indicating that he was fully cognizant of his actions at the time. We also note that Corporal Morrissette testified that he gave the appellant full *Miranda* warnings at the start of the 6:00 p.m. interrogation session and that the appellant orally agreed to waive those rights and to proceed with the questioning.

In evaluating the circumstances surrounding a confession which follows upon the heels of an illegal detention, we do not apply a rigid talismanic test. *See generally United States v. Close,* 349 F.2d 841, 851 (4th Cir. 1965), *cert. denied,* 382 U.S. 992 (1966); *Wilkins v. Maryland,* 402 F. Supp. 76, 83 (D. Md. 1975), *aff'd,* 538 F.2d 327 (4th Cir. 1976), *cert. denied,* 429 U.S. 1044 (1977). Instead, we consider all of the circumstances surrounding the confession, including the time, place, and manner of its taking; intervening events; its content compared to prior statements given by the appellant; and other factors reflecting upon the appellant's alleged free will in making the statement. The list is not exclusive. Taking all of the foregoing into consideration, we hold that the State demonstrated that the second statement was a product of the appellant's free will divorced from the preceding illegal detention. Judge Levin was correct in denying the motion to suppress the second statement, when he said:

> "The inculpatory statement that was taken from the Defendant was taken subsequent to his being taken before the commissioner, and after a time for eating and a time for reflection, and a time for deliberation. It is my judgment that the Johnson v. State of Maryland case is distinguishable from the facts in this case. . . ."

III

On the day Carol and Heather Lewis were murdered, 12-year old Darlene Brown observed a man walking up the driveway toward the front door of the Lewis home between 4:45-5:00 p.m. At that time Darlene was walking down the driveway of her house across the street from the Lewis home. That night after the murders had been discovered, Darlene gave the police a written desription of

the man she had seen earlier. Four days later she made another written statement describing him. Both descriptions indicated that the suspect was in his late twenties, clean shaven, over six feet tall, and had blondish hair. Darlene also told the police that he was wearing a light-colored suit and that he was carrying a briefcase.

From this description, the police made a composite drawing. Then, on October 8, 1977, the day of appellant's arrest, Corporal Morrissette brought six pictures to Darlene's home and asked her to look at the pictures to see if she recognized the man she had seen on the Lewis driveway fifteen days earlier. After discarding a picture of Detective Kowalski who had worked on the composite drawing with her, she carefully considered the other five photographs and picked out the appellant.

Appellant has continually argued that the photographic array was impermissibly suggestive and would, therefore, taint an in-court identification.[9] The photographs are part of the record and we have independently examined them and the testimony concerning the conduct of the array. Although the photographs were not absolutely uniform, they were substantially similar. We are unable to find that the photographic array, under "the totality of the circumstances surrounding it, was so unnecessarily suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ." *Smith and Samuels v. State,* 6 Md. App. 59, 67, 250 A.2d 285, 290 (1969), *cert. denied,* 397 U.S. 1057 (1970). Indeed, the photographic array shown to Darlene Brown does not have even thresh-

[9]The trial judge conducted suppression hearings both before trial and during trial; he concluded that there was no primary illegality that would taint the judicial identification of the appellant by Darlene Brown. *Cf.* Green v. State, 281 Md. 483, 380 A.2d 43 (1977).

old suggestiveness, and therefore, appellant has not carried his initial burden requiring a response by the State. *Godwin v. State,* 38 Md. App. 716, 727, 382 A.2d 596, 603 (1978). *See McDowell v. State,* 31 Md. App. 652, 663, 358 A.2d 624, 630 (1976); *Martin v. State,* 40 Md. App. 248, 255, 389 A.2d 1374, 1378 (1978).

At trial, but out of the presence of the jury, Darlene, who had never been inside a courtroom before, took the witness stand and was asked to make an in-court identification of the man she saw at the Lewis home. She stood up and pointed to co-counsel David M. Martin, seated at the counsel table with principal trial counsel, Joseph A. DePaul. Appellant had been previously seated among the courtroom spectators. After a bench conference during which the State argued that the defense had engaged in misleading tactics, the judge ordered the bailiff to bring in the jury. However, before the bailiff could leave, Darlene asked permission to try again because "I saw a couple of people I didn't see before."

Over vigorous objections by the defense and after some brief questioning by the court, all males in the courtroom were ordered to stand, and Darlene was permitted to walk around the courtroom eliminating the males one by one. When a few men remained standing, she returned to the stand and identified the appellant. She was then questioned by the court and denied receiving any assistance or prompting. She attributed her need for a second opportunity to her failure to look closely, in the first instance, at the men in the back of the courtroom.

Before the jury returned, appellant's counsel produced six witnesses who testified that Darlene appeared to have had eye-contact with some spectators during the bench conference that followed her erroneous first identifica-

tion. None of these witnesses heard Darlene speak, although one witness stated that she appeared to mouth some words. After the testimony was concluded, the jury returned and the court, over the appellant's continuing objection, allowed Darlene to identify the appellant.

As we understand appellant's argument, it is premised upon an assumption that the judicial identification in the jury's presence was tainted at the hearing immediately preceding it. During the direct, cross, redirect, and recross examinations of the youthful witness, the circumstances of both her pretrial photographic identification and her judicial identification were brought out before the jury. As Judge Moylan has stated for this Court:

> "An in-court identification, as any other evidence, civilly or criminally, may be tested and probed by the traditional device for such testing and probing – the use of cross-examination. . . . What happens in the courtroom is open for judge and jury to see and does not call for the Sixth Amendment's special ventilation of musty and secret station house proceedings."

Green v. State, 35 Md. App. 510, 521, 371 A.2d 1112, 1119, *reversed on other grounds,* 281 Md. 483, 380 A.2d 43 (1977). The examination by appellant's counsel of the witness in this case was rigorous and probing. The jury became aware of the erroneous first identification made out of their presence and could weigh that factor in assessing Darlene's credibility. Moreover, the court conscientiously afforded the appellant an opportunity to challenge Darlene's judicial identification before it was revealed to the jury. Upon our independent review of the record, we find no error in allowing Darlene to identify the appellant.

IV

Over defense objection, thirty-five pictures were introduced into evidence. Appellant contends that because "the photographs were unnecessary and prejudicial as tending to inflame the passions of the jury," the trial judge abused his discretion in admitting them.

The admission of photographs is within the discretion of the trial court, and its determination will not be disturbed on appeal unless it clearly abused its discretion in admitting them. *Carroll v. State,* 11 Md. App. 412, 414-15, 274 A.2d 677, 678-79 (1971). *See Rasnick v. State,* 7 Md. App. 564, 569-70, 256 A.2d 543, 546 (1969), *cert. denied,* 400 U.S. 835 (1970); *McLaughlin v. State,* 3 Md. App. 515, 523, 240 A.2d 298, 303 (1967); *See also Clarke v. State,* 238 Md. 11, 207 A.2d 456 (1965).

Appellant has failed in his brief to indicate the nature of the prejudice claimed as to thirty-one of the thirty-five photoographs.[10] We are unable to find any error by the trial court in admitting the thirty-one photographs.

Of the remaining four photographs, two showed the bodies in the positions in which they were originally found and two were autopsy photographs showing the multiple stab wounds. Originally, the State attempted to introduce thirteen photographs showing the bodies at the crime scene and prior to the autopsy. The record demonstrates that Judge Levin assiduously evaluated each of the thirteen photographs, selecting four that he thought were appropriate. No abuse of discretion is disclosed by the record, and appellant's contentions to the contrary must fail.

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[10]These were pictures of the crime scene, the appellant's automobile, and the appellant. The victims' bodies were not fully visible in any of the crime scene photographs.

V

The reports of the autopsies performed on the victims and received in evidence contained identical statements that: "The manner of death is homicide." Appellant sought to strike those statements at trial prior to the reports being received, and now urges the same point as a basis for a reversal of his convictions on appeal. We find no error.

Appellant's reliance on *Benjamin v. Woodring,* 268 Md. 593, 303 A.2d 779 (1973) is misplaced. In that civil case, the decedent's death was caused by an overdose of barbiturates; the medical examiner's conclusion of suicide was based on facts extrinsic to the autopsy supplied by Mrs. Benjamin, the plaintiff. Moreover, the manner of death was central to the dispute between the parties.

The medical examiner's conclusion in the instant case that the deaths of Carol and Heather Lewis were homicidal was a product of the autopsy examinations themselves without the need for extrinsic evidence. Obviously, the multiple stab wounds inflicted upon both bodies were not accidental, natural, or suicidal; they were, therefore, homicidal. Moreover, the autopsy statements were perfectly consistent with the appellant's defense. In his opening statement, appellant's counsel argued: "There is no question that Mrs. Lewis and Heather Lewis were brutally slain that day in Bowie. There isn't any dispute over that. Indeed, we readily concede that." This position was reiterated in the closing argument when appellant's counsel informed the jury that Mr. Meyer "is not telling you to disregard the fact that poor Mrs. Lewis and her daughter were killed."

Since the manner of death was undisputed, leaving appellant's criminal agency as the primary issue, we think the

case fits squarely within our prior decision in *Malekar v. State*, 26 Md. App. 498, 338 A.2d 328 (1978). What Judge Moylan said there, applies with equal force here:

> "The conclusion that the cause of death here was homicidal, stemming from the obvious physical fact of strangulation, was not a product of investigative activity on the part of the Medical Examiner's Office but was a direct product of the autopsy examination itself. The conclusion, moreover, was completely consonant with the appellant's theory of the case, since his version of the fatal incident had been that two robbers burst into the home and killed his employer. We see neither error nor prejudice."

Id. at 510, 338 A.2d 344-35. Similarly, in this case we see no error and it is obvious that appellant has suffered no prejudice.

VI

Appellant objects to the seizure by Prince George's County Police of his 1974 Maverick parked in his mother-in-law's driveway in Arlington, Virginia. Specifically, he contends that "the initial warrantless seizure of the car in Virginia was illegal, and tainted the subsequent search pursuant to the warrant in Prince George's County." The record unequivocally demonstrates that the police obtained the express permission of Hortensia Meyer, appellant's wife, for the seizure of the automobile. It is uncontroverted that Mrs. Meyer was a co-owner of the automobile. As such, she had the authority to consent to her automobile being towed from Virginia to Maryland. Appellant's objection to the seizure is without merit. *Wade v. Warden*, 278 F. Supp. 904 (D. Md. 1968); *United States v. Carter*, 569 F.2d 801 (4th Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

VII

During the early stages of the trial, the State attempted to introduce the search warrants, applications therefor, and supporting affidavits that had been obtained for the search of appellant's apartment and automobile. Contained within the applications was the confession of Lon Lewis that incriminated the appellant. In proffering the materials, the State indicated that it wanted to "show this jury that the police didn't go like storm troopers into that home." Appellant objected to the introduction of the materials. The court agreed with appellant and refused to admit them; however, as a compromise it instructed the jury:

> "All right, ladies and gentlemen of the jury, there were two exhibits, 44 and 45. One is a search warrant for a car. And the other warrant is a search warrant for a premises. I am not going to admit these search warrants, but I instruct you that these search warrants were issued by two separate judges and signed by them to be issued. And they were executed.
>
> And I further instruct you that no search warrant is issued by a judge, either here or in Montgomery County, and this is applicable to both of these search warrants, that they are only issued based upon probable cause."

It is the appellant's contention that the instruction was improper "[e]specially since the technical concept of 'probble cause' was not explained to the jury . . . ." He claims that the jury could have been misled to his prejudice into believing that the issuance of the search warrants was evidence of his guilt.

We believe that it would have been preferable for the trial court to have omitted any reference to probable cause

or, once having made such a reference, to have explained its technical meaning to the jury. Nevertheless, we do not find that the instruction as given constitutes error. The authority cited by appellant, *Dempsey v. State,* 277 Md. 134, 355 A.2d 455 (1976), is inapposite. There the court informed the jury of the court's finding that a confession was voluntary, an issue which the jury had the duty ultimately to decide for itself. Here the instruction, coming early in the trial, in no way usurped or interfered with the jury's role. Furthermore, there was extensive prior testimony, to which no objection was made, that both warrants had been "approved" by a judge. We find no prejudice.

Judgments affirmed; costs to be paid by appellant.

APPENDIX D

IN THE CIRCUIT COURT
OF PRINCE GEORGE'S COUNTY

GENE THOMAS MEYER, Petitioner	:	
vs.	:	Petition
	:	Docket No.__
STATE OF MARYLAND Respondent	:	

PETITION FOR POST CONVICTION REVIEW

Comes now, the Peititioner, Gene T. Meyer, by and through his attorneys, JOHN T. BELL, and the law firm of BELL, CORNELIUS & SHORE, pursuant to Article 27, Section 645, Maryland Code, and Rule BK41, Maryland Rules of Procedure, and respectfully represents to this Honorable Court as follows:

1. That the Petitioner is currently held in the Patuxent Institution at Jessup, Maryland under the jurisdiction of the Maryland Department of Corrections.

2. That the Petitioner is currently serving consecutive sentences of life imprisonment and thirty (30) years as ordered on June 6, 1978, in the Circuit Court of Prince George's County, Maryland, under the conviction for murder in Criminal No. 18 621 of which this *Petition* concerns.

3. That Petitioner appealed this conviction to the Court of Special Appeals averring that his self incriminatory statements introduced at trial were inadmissible because his delay in presentment before a District Commissioner violated M.D.R. 723, and that the State's identification procedure was impermissibly tainted. Petitioner's convic-

tion was affirmed on October 9, 1979, and *Writ of Certiorari* denied by the Court of Appeals on December 20, 1979.

4. Petitioner additionally is serving sentences unrelated to the convictdion and sentence of June 6, 1978.

The Petitioner respectfully bases his petition for relief on the following grounds:

1. The Petitioner was arrested on October 8, 1977, and held approximately fifteen hours before he was transferred to the County Detention Center. Most of this time was devoted to obtaining two (2) statements from the Petitioner. The Petitioner was not given a copy, as required. of either his arrest warrant prior to his interrogation or the search warrant for his apartment, though both were already prepared. Plaintiff claims that his *Miranda* warnings were never read to him before or during his interrogation.

2. During the fifteen (15) hours of detention by the Prince George's County Detectives, the Petitioner made two (2) statements which served as the essential basis of the State's case against him. Petitioner claims these statements were made involuntarily.

3. The Petitioner was taken before a District Commissioner to be charged as required, only after a delay in excess of nine (9) hours. The Petitioner made his first statement after interrogation conducted during this delay. Petitioner claims that he was not fully apprised by the Commissioner during their ten (10) minutes meeting of his rights or the nature of the doucments that the Petitioner then signed.

4. The District Commissioner ordered the Petitioner transfered to the County Detention Center, yet the Peti-

tioner was instead returned to the custody of the Prince George's Detectives for the express purpose of interrogation, interrogation which lasted into the night.

5. The Petitioner claims that he was repeatedly denied access to a phone and counsel throughout the day. Both the Petitioner's wife and an attorney acting on their behalf were refused access to Petitioner on a number of occasions during his day-long interrogation.

6. During the April, 1978, trial for Criminal No. 18621, Petitioner was not included in crucial bench conferences. The exclusion from such was prejudicial to his interests.

7. The Petitioner claims that his public attorney did not vigorously press his cause following conviction, and ignored his express desire not to waive a number of issues on appeal.

WHEREAS and because of the aforegoing, the Petitioner respectfully offers to this Honorable Court the following contentions:

I. That the Petitioner was denied his right to Protection against self incrimination as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution, and Article 23 of the Maryland Declaration of Rights, by the use of the two statements taken during interrogation against him.

II. That the Petitioner was denied his rights to assistance of counsel as guaranteed by the Sixth and Fourteenth Amenmdments of the United States Constitution and Article 21 of the Maryland Declaration of Rights, during the unreasonably long and unlawful detention for purposes of interrogation.

III. That Petitioner was denied his right to a timely copy of the arrest warrant as guaranteed by Maryland law.

IV. That Petitioner was denied his right to be present at all stages of his trial as guaranteed by Maryland law.

V. That Petitioner did not waive any right to appeal the issues of this petition because of inadequate representation by the Public Defender in the appeal of his Circuit Court conviction.

WHEREFORE, the Petitioner respectfully prays that this Honorable Court grant such relief as follows:

1. An evidentiary hearing to prove Petitioner's contentions, I - V.

2. A new trial if such contentions are proved, so as to prevent injustice.

3. For such other and further relief as the nature of this cause may require.

BELL, CORNELIUS & SHORE

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APPENDIX E

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

GENE THOMAS MEYER	:	
Petitioner	:	
	:	
vs.	:	LAW NO. 95079
STATE OF MARYLAND	:	(Criminal Nos.
Respondent	:	18621-18623

VERIFICATION OF PETITION FOR POST CONVICTION RELIEF

I CERTIFY on this 21st day of March, 1983, that I am competent to be witness and have personal knowledge of the facts set forth herein.

1. On October 8, 1977, officer Hatfield of the Prince George's County Police came to may apartment in Rockville and placed me under arrest. I was taken immediately to a waiting police cruiser. I was not given a copy of the arrest warrant or a copy of a search warrant for my apartment. This occurred at 7:30 a.m. I requested my wife to get an attorney for mer.

2. I was immediately taken to the Prince George's Bureau of Criminal Investigations (BCI) in Forestville, Maryland and placed in an interrogation room. I spend about 15 hours at BCI that day, mostly under interrogation and made two statements.

3. While there, neither Hatfield nor any other officer ever informed me of my constitutional rights either before, during or after the giving of the first statement.

My repeated requests for an attorney were repeatedly refused. AlthoughI signed two statements that day and evening, I signed no waiver form.

4. At 4:00 p.m. I was taken to Upper Marlboro and formally charged by a district commissioner. I had been photographed previously. While there, I was "booked", or processed. Prior to being present before the district commissioner, I had signed a first statement written by Hatfield between 11:00 a.m. and 4:00 p.m.

5. I was before the district commissioner for a brief time not exceeding 10 minutes. At no time while there, did I sign a formal waiver of rights.

6. After this, I was returned to BCI for further interrogation by Morrissette. Again, I was never informed of my *Miranda* rights. I was not given dinner until close to 10:00 o'clock.

7. I was questioned continuously by Morrissette until 9:00 p.m. At that time, Morrissette recessed to prepare a written statement. Morrissette had indicated that he could make it easy on my if I would confess. Morrissette took a statement from me in question and answer format from 9:20 p.m until 10:00 p.m. After Morrissette finished typing the statement, he submitted a written waiver of rights to me to sign. I refused. I did, however, sign each of the pages of the typed statement. Then I was taken to the county jail.

8. When contacted by Geraldine Sweeney about the preparation of the appeal for my conviction, I had instructed her to raise the issues of the prevention by the police of my attorney's repeated efforts to see me during interrogation and the involuntariness of my statements under *Miranda. I received in the mail a final filed brief on*

November 10, 1978.I was surprised when I read the appellate opinion to see that it stated that the Miranda issue was not raised, and to see that the issue of my denial of counsel during interrogation was not raised. I wrote her a letter dated November 6, 1979 in this subject. However, I received a letter from her on November 9, 1979 stating that the public defender's office had chosen not to raise these issues on appeal because they were credibility issues that were not winable.

9. After instructions I was not brought forward to participate during a bench conference between the judge, prosecutor and my defense attorney pertaining to a note received from the jury requesting written copies of the testimony, Rule 723 and the laws cited by the attorneys. I did not waive my right to be present when the judge decided to refuse the jury's request. (p.810) Had I known I had a right to be there I would have so requested.

I DO SOLEMNLY DECLARE AND AFFIRM under the penalties of perjury that the contents of the aforegoing *Verification* are true and correct.

Verification are true and correct.

APPENDIX F

IN THE CIRCUIT COURT
OF PRINCE GEORGE'S COUNTY

GENE THOMAS MEYER, Petitioner	:	
	:	Petition Docket
vs.	:	No. _____
STATE OF MARYLAND Respondent	:	

STATEMENT OF FACTS

On September 23, 1977, Carol Ann Lewis and her baby daughter, Heather, were stabbed to death in their home, in Bowie, Maryland. Carol's husband, Lon Lewis, discovered the bodies at approximately 6:45 p.m. The Prince George's County Police responded to the home, photographed the scene, and collected evidence. Mr. Lewis was subsequently questioned at times over the next two weeks until on October 7, 1977, when he confessed to conspiring with his co-worker, Gene T. Meyer, to murder their wives. With Meyer thus implicated, the police drew up a warrant for Meyer's arrest for the murder of Carol and Heather Lewis, attaching to it a copy of the Lewis confession.

On October 8, 1977, a Montgomery County Judge issued the warrant for Meyer's arrest. Officer Hatfield of the Prince George's (P.G.) County police immediately went to Meyer's apartment in Rockville, roused Meyer from bed, placed him under arrest at approximatly 7:30 a.m., and immediately took him out to a waiting police cruiser. Meyer was not given a copy of his arrest warrant, nor was a copy of the search warrant for his apartment given to either Meyer or his wife. The P.G. police escorted

Mr. Meyer immediately after the arrest to police headquarters for purposes of taking a statement. The Meyers' apartment was searched for evidence soon after their departure. The police left a copy of the search warrant on the table of the apartment.

Meyer was taken to the Prince George's Bureau of Criminal Investigations (BCI) in Forestville, Maryland and placed in an interrogation room. He spent approximately 15 hours at B.C.I. that day, mostly under interrogation, and made two (2) statements. Testimony at Meyer's subsequent murder trial conflicted as to the extent of questioning and discussion which transpired during the ride from Rockville to Forestville. Officer Hatfield claimed that he placed Meyer immediatley in the B.C.I. interrogation room because of Meyer's request to read Lewis' confession. Hatfield produced the Lewis statement and read it to Meyer, repeatedly interjecting questions as they progressed through the text. At the conclusion, Hatfield testified that Meyer requested to "tell his side" and, consequently, Hatfield took a statement from Myer.

This statement generally denied any involvement with the killings, though Meyer did admit to knowing that Lewis wanted to "get rid" of his wife, and to being at the Lewis home on the evening of September 22, 1977, and to owning a light colored suit and dark briefcase at that time. These admissions, together with the statement as a whole, were later used in the State's case against Meyer. Meyer testified that neither Hatfield nor any other officer ever informed Meyer of his constitutional rights before or during the taking of the first statement, and in fact repeatedly refused his requests for an attorney. Hatfield testified, however, that he read Meyer his *Miranda* rights off a card both in the cruiser outside Meyer's apartment and in the

interrogation room prior to taking the first statement. He further claimed that Meyer at no time requested to see an attorney or make a phone call. There was, however, no corroborating testimony to support Hatfield's claim that he read Meyer hsi rights, as in each instance cited, Myer and Hatfield were alone. While Meyer signed each page of the statements taken both that morning and evening, no waiver form was ever signed by Meyer.

Meyer was held at B.C.I. from his arrest at 7:00 a.m. until approximately 4:00 p.m., at which time he was taken to Upper Marlboro to be formally charged by a District Commissioner. Prior to this time, however, Meyer was photographed for the purpose of compiling a "photo-spread" for identification by the sole eye-witness, Darlene Brown. He was also formally processed (i.e. fingerprinted, etc.) sometime close to 4:00 p.m. The actual dictation of the first statement, written by Hatfield, took place between approximately 11:00 a.m. and 4:00 p.m.

At 4:00 p.m., the police took Meyer before District Commissioner O'Brien for a brief time not exceeding ten minutes. O'Brien testified that he read Meyer the charges, informed him of his right to counsel, and advised him as to the availability of the Public Defender. Meyer signed an initial appearance report which advised Meyer of his Court date and bond status, and signed a form requesting a preliminary hearing. At no time during appearance did Meyer sign a formal waiver of his rights. O'Brien signed these two documents and a third committing Meyer to the custody of the Sheriff and the County jail.

Meyer was thereupon taken back to B.C.I., following a short detour to purchase a dinner for him. Meyer claims he was not given this dinner until close to 10:00 p.m. Corporal Morrissette, the officer who interrogated Meyer in

the evening, testified that Meyer ate his dinner upon his returrn to B.C.I. at approximately 4:30 p.m. In any event, Meyer was placed in an interrogation room at B.C.I. and Morrissette began to question him. Morrissette testified that he read Meyer his *Miranda* rights, but again Meyer denies ever being so informed. As with Hatfield, there is no corroborating testimony for Morrissette's account.

Morrissette continued questioning Meyer until approximately 9:00 p.m. at which time Morrissette recessed in preparation for recording Meyer's statement. Meyer claims that Morrissette intimated that he could somehow "make it easy" on Meyer if he confessed. Morrissette denies this as he denies ever alluding generally to the probability that if Meyer didn't confess "they would drop the pill" on him in prison (evidently a reference to some unspecified threat of death). Morrissette typed a statement from Meyer in a question and answer format from 9:20 p.m. until approximately 10:00 p.m. Although this statement generally acknowledged guilt in the slaying of Carol Lewis, Meyer denied stabbing Heather and answered many questions with "I don't know" replies.

After Morrissette had finished typing the statement, he submitted a written waiver of rights for Meyer to sign, which Meyer refused. Morrissette then consulted with a superior, Lieutenant Crump, who instructed Morrissette to add the question, "Were you advised of your constitutional rights by the District Court Commissioner?", to which Meyer replied that he didn't remember. Meyer did sign each of the pages of the typed statement. Following completion of the statement, and Meyer's refusal to sign the written waiver, Meyer was finally taken to the county jail.

During the latter half of the day, Mrs. Meyer, accompanied by Mrs. Meyer's mother and two friends, Mr. and Mrs. Lash, waited vainly for a number of hours to see Meyer. Police at B.C.I. told Mrs. Meyer that she could neither see her husband that day, nor get a lawyer for him, as Meyer had to request one himself. Later an attorney, David Martin, was instructed by a partner in his firm on behalf of Mrs. Meyer to contact Meyer as soon as possible. Martin testified to the events of that day as follows: Martin first called B.C.I. around 6:30 p.m. to speak with Meyer and identified himself as Meyer's attorney. He was told then that Meyer was eating dinner and couldn't speak to him. When Martin tried again at 7:00 p.m., he was told that Meyer had been transferred to the Prince George's County Detention Center. Martin proceeded to the County Detention Center in Upper Marlboro, only to find that Meyer was, in fact, still at B.C.I. When Martin arrived at B.C.I. at approximately 8:30 p.m., he was told by an officer that Meyer had "just left" for the County Detention Center. Martin returned to the County Detention Center and determined after a half hour search that Meyer was not there. Another call to B.C.I. sometime close to 10:00 p.m. was placed, and Martin was again told Meyer was on his way. This time Meyer did arrive sometime past 10:30 p.m. at the County Detention Center and was then able to meet with Martin.

In the pre-trial suppression hearings, Officer Gale testified that he had spoken with Marti that evening, but claimed that it could not have been before 10:00 p.m., as he testified that he was in Baltimore with two managers from Data-Point, Meyer's employer, until that time. Other testimony revealed, however, that Gale and the two Data-Point personnel had, in fact, returned before 8:30 p.m. Two statements that were taken from the Data-employees

that evening were recorded at 8:30 p.m., and Gale testified that he had driven those two back from Baltimore. Meanwhile on October 7, 1977, Prince George's police searched Meyer's apartment during which they seized a pair of Meyer's shoes later introduced into evidence, and located Meyer's car at his mother's home in Northern Virginia. The car was towed to a Prince George's police station, and searched, at which time the police removed a black briefcase which was subsequently introduced as evidence.

Later the police visited the home of the twelve (12) year old eyewitness, Darlene Brown, to show her a photospread compiled and determine if she could identify Meyer as the man she had reported seeing in front of the Lewis' home the day of the murders. Brown picked out Meyer from the collection of six photographs. At trial Meyer strongly protested Brown's identification as impermissibly suggestive. Meyer contended that since her sighting had been made at a distance of approximately 100 yards, she was prone to remember only the most distinctive features, such as his unusual height and hair style. In the photospread Meyer was clearly the tallest and the only to have hair over his ears (all other five photos were of Prince George's detectives).

At his trial in April of 1978, Meyer's salient defense centered on the contention that his statements were made involuntarily, which therefore made them inadmissible as the tainted product of illegal detention, and denial of his *Miranda rights*. Meyer relied on Maryland District Rule 723 to assert that the police were required to bring him before a District Commissioner for formal charging "without unnecessary delay." The delay of nine (9) hours, Meyer contended, was illegal and thereby tainted both statements taken that day, citing as support the recent decision in *Johnson v. State* 282 Md 314 (1978). Meyer additionally contended that both the in-court and out-of-court identification of Meyer by Darlene Brown was impermissibly suggestive and therefore inadmissible. Meyer lost on all fronts and was convicted for first degree murder of Carol Lewis and second degree murder of the daughter, Heather. He received consecutive sentences of life imprisonment and thirty (30) years respectively.

On appeal, Meyer's case was handled by the Public Defender's Office. The issues of the voluntariness of Meyer's statements and the denial of counsel during interrogation were not pressed. The Public Defender appealed mainly on the basis of Maryland District Rule 723, and *Johnson*, together with the question of the admissibility of Brown's identification of Meyer. The Court of Special Appeals noted in footnote four (4) of its opinion that "At the trial, the jury also heard the conflicting testimony concerning the treatment of the appellate by the police. We note that the appellate does not, on appeal, challenge the voluntariness of his statements or the adequacy of his waiver of his *Miranda* rights" *Meyer v. State* 43 Md App 427 (1979). Meyer had, in fact, directed his public attorney to press the issue of the prevention by the police of his attorney's repeated efforts to see him during his inter-

rogation (see Meyer letter to Geraldine Sweeney dated 11/6/82) on appeal, but was informed by letter (see Sweeney letter to Meyer dated 11/9/82) that the Public Defender's office had chosen to drop the issue on appeal, viewing it as an unwinable or "credibility" issue. The Court of Special Appeals affirmed Meyer's conviction in *Meyer v. State* 43 MdApp 427 (1979), finding that while the nine hour delay was "unnecessary" and improper, the first statement was admissible as basically exculpatory and "harmless." The second statement was also ruled admissible by the Court as the product of deliberate reflection and independent decision. None of the questions concerning voluntariness, *Miranda* rights, or denial of counsel were addressed. The Court of Appeals denied to issue a writ of certiorari in 286 Md. 750, as did the U.S. Supreme Court in 446 U.S. 938.

BELL, CORNELIUS & SHORE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of October, 1982, I mailed postage prepaid a copy of the aforegoing *Statement of Facts* to the Office of the State's Attorney, Prince Georges County, Maryland.

_____

JOHN T. BELL

APPENDIX G

IN THE CIRCUIT COURT
OF PRINCE GEORGE'S COUNTY

GENE THOMAS MEYER, Petitioner	:	
	:	Petition Docket
vs.	:	No. _____
	:	
STATE OF MARYLAND Respondent	:	

MEMORANDUM OF LAW

I. MEYER'S STATEMENTS WERE MADE INVOLUNTARILY AND IN DEROGATION OF HIS CONSTITUTIONAL RIGHTS AND WERE THEREFORE INADMISSIBLE AS THE TAINTED PRODUCT OF POLICE COERCION.

It is well established that an accused held by the police for interrogation has a right against self incrimination guaranteed by the Fifth and Fourteenth Amendments as well as Article 23 of the Maryland Declaration of Rights. In order for Mr. Meyer's conviction to stand, the State must have established that Meyer made his two statements voluntarily, free of inducemnt or coercion, having knowingly and intelligently waived his right to remain silent. *Miranda v. State of Arizona,* 384 U.S. 436 (1966); *Mallory v. Hogan* 378 U.S. 1 (1964); *State v. Kidd* 281 M.D. 32 (1977). The State must have demonstrated that the waiver of rights resulted from the defendant's free will; a presumption of waiver from mere silence on the part of the accused following *Miranda* warnings or from the fact that a statement was in fact obtained is not permissible. *Myers v. State* 3 M.D. App. 534 (1978). The State's case

against Mr. Meyer rests almost entirely on the two statements obtained on October 8, 1977, supported only by an uncertain identification made by twelve (12) year old Darlene Brown. Absent a showing that Meyer's conviction was founded on two voluntary statements, no other independent basis for his conviction exists. Petitioner maintains that the State has not carried this burden of proof with regard to establishing the voluntariness of the statements and now seeks review of his conviction in light of the failure of his previous counsel to raise this issue.

In assessing the voluntariness of an accused's statement, the Court should consider the totality of circumstances, as no one single factor is determinative. *Hadder v. State* 238 M.D. 341 (1965). Consideration of these circumstances should focus on determining whether the statements were made knowingly and voluntarily, and were the product of rational intellect and free, uncoerced will *Lynumm v. State* 372 U.S. 528 (1963). In Mr. Meyer's case, consideration of any single instance of police conduct may not in itself appear to justify the conclusion that Meyer's statements were involuntary. Yet the entire sequence of events that transpired on October 8, 1977, taken as a totality, evidences a disturbing pattern of police coercion directed at extracting a confession from Mr. Meyer.

From the moment Mr. Meyer was first arrested on October 8, 1977, he was continuously held in a position of helplessness and isolation. Detective Hatfield did not serve Meyer with a copy of his arrest warrant, either upon arerst or anytime thereafter, despite the requirements of Maryland District Rule 720 (f) and Rule 720 (e), Maryland Rules of Procedure. These rules provide that the accused is to be served a copy of the warrant "as soon as possible after the arrest", Maryland District Rule 720 (f). These

Rules "are not guides to the practice of law but precise rubrics "established to promote the orderly and efficient administration of justice and (they) are to be read and followed". *Brown v. Fraley,* 222 M.D. 480, 483 161 A2d 128 1960 *Countess v. State* 280 M.D. 444, 463 (1979).

If Meyer had been given a copy of his warrant, he could have learned the nature of the State's case against him without depending on the police. Officer Hatfield made much of Lon Lewis' confession in his initial exchanges with Meyer, and offered to read the confession through with Meyer soon after Meyer's arrest. Yet Meyer need not have depended on Hatfield to provide the statement if he had been served a copy of his wararnt, attached to which was a copy of the Lewis confession. Hatfield, however, used the Lewis confession as a means of inducing Meyer to make incriminating statements. Hatfield teestified that he took Meyer immediately to an interrogation room at B.C.I. to read through Lewis' confession with Meyer, allegedly on Meyer's request. The entire environment, however, was fashioned to create a psychological dependence in Meyer directed at inducing him to make a confession. According to his own testimony, Hatfield repeatedly interjected questions during his reading of the Lewis confession. This situation was certainly the "functional equivalent" of an interrogation, during which the accused is entitled to the protection of his constitutional rights against coercive police practices, no matter how veiled, *Rhode Island v. Innis* 100 S.Ct. 1682 (1980); *Brewer v. Williams* 430 U.S. 387 (1977).

Mr. Meyer was held in interrogation with only brief interruptions for approximately nine hours before he was taken before a District Commissioner for formal charging, as required by Maryland District Rule 723. The language

of this provision, however, clearly demands that the accused be so charged before a judicial officer "without unnecessary delay". The Court of Special Appeals held in its decision in *Meyer v. State,* 43 M.D. App 427 (1979), that the delay in this case did indeed constitute an "unnecessary delay" and it was therefore error to admit the first statement because it was obtained in violation of Maryland District Rule 723. *See also Johnson v. State,* 282 M.D. 341 (1978). The admission of the statement made by Meyer during that morning's interrogation was not held not to constitute error only because its admission was held "harmless". Yet the Court, in emphasizing the first statement's largely exculpatory character, ignores the holding in *Miranda v. State of Arizona* 384 U.S. 436 (1966), followed in Maryland cases, that for purposes of admissibility, no distinction may be drawn between inculpatory statements and ones allegedly exculpatorey. *Law v. State,* 21 M.D. App 12, aff. after remand 29 M.D. App 457 (1974).

The Court of Special Appeals stated that their second statement provided a sufficient basis for concluding that the evidence against Mr. Meyer was "overhwelming", which thus made the admission of the first statement harmless. Such evidence as "expert testimony concerning the nature of the wounds on the victims' bodies and the strength required to inflict such wounds" was cited to reinforce the Court's position that the evidence against Meyer was "overwhelming". This approach is akin to placing the cart before the horse, in that the Court uses the later statement to justify the admission of the earlier one, even though his day-long interrogation, including the earlier statement was an important and crucial factor in his making that second statement. It is established that even if the truth of a confession is shown independently, the confes-

sion is inadmissible if it was obtained in violation of the defendant's rights, *Blackburn v. Copinger* 300 F Supp 1127 (4th, 1969); *Law v. State* 21 M.D. App 12, aff. after remand 29 M.D. App 457 (1974). In a similar way, admission of the earlier statement cannot be justified by the Court's belief that Meyer's guilt was established outside of the morning statement. Admitting the earlier statement on the strength of the later statement ignores the central question of the voluntariness of either and overlooks the importance of the morning's events in the daylong pattern of coercion.

The Court of Special Appeals based its decision to affirm the admission of Meyer's evening statement on its interpretation of Maryland District Rule 723 and *Johnson v. State* 282 MN.D. 314 (1978). The evening statement was held admissible as the product of an "independent act" and "deliberate reflection" and thus not tainted by the earlier violation of Maryland District Rule 723 and improper interrogation. Again, the crucial issue for the present centers on the voluntariness of the evening statement and Meyer's alleged waiver of rights. The State was never required to carry the burden of showing that Meyer's alleged waiver of rights was indeed voluntary.

It is well established that a heavy burden rests on the State to demonstrate that a defendant held incommunicado for a period of interrogation waived his privilege against self-incrimination, knowing and intelligently *State v. Kidd* 281 M.D. 32 Cert. den 434 U.S. 1002, *Hale v. State* 5 M.D. APp 326 (1968). The State must show that the statements used against Meyer were obtained in conformance with the dictates of the Supreme Court's *Miranda* decision, and were made voluntarily. As the Supreme Court held in *Miranda* 384 U.S. at 476, "whatever the

testimony of the authorities as to the waiver of rights by the accused, the fact of the length interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not voluntarily waive his rights." The Supreme Court has further made clear that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that the confession was in fact eventually obtained" *Miranda* 384 U.S. at 475. *See Carnley v. Cochran* 369 U.S. 506, (presumption of waiver from silent record impermissible; record must show, or evidence exist, that waiver was intelligent and knowing"). Mr. Meyer was held incommunicado throughout the day, and the only evidence the State could offer to establish any voluntary waiver on Meyer's part was the uncorroborated testimony of Officers Hatfield and Morrissette.

Opposed to the State's position is the uncontroverted testimony of Mr. Meyer that he asked his wife to get him his lawyer, the uncontroverted fact that the police refused to allow Mrs. Meyer to see her husband at any time, and the uncontroverted testimony describing the pattern of misinformation which prevented Mr. Martin, the attorney, from meeting with Mr. Meyer. Further, police testimony admitted that Mr. Meyer was returned to the Bureau of Criminal Investigations after his brief appearance before the District Commissioner for the express purpose of further interrogation, contrary to the Commissioner's Commitment Order. The Court in *Epps v. Levine* 457 F. Supp 561, 567, (4th Cir, 1978) held that "under Maryland law a person accused of a crime has (1) a right to have the state court with jurisdiction over him . . . determine . . . to whose custody he will be committed if pre-trial release is not available, and (2) a right to remain in the custody of the designated officer until further Court order."

The fact that Meyer signed certain papers before Commissioner O'Brien and evidently did not register any protest is not dispositive of the waiver issue. The accused in *Miranda* had signed a written waiver of rights – something Meyer never did – yet the Supreme Court found it to be an invalid waiver of his rights as it was not a "knowing and intelligent" waiver, *Miranda* 384 U.S. at 475. The circumstances of Meyer's exceedingly brief meeting with O'Brien hardly warrants a presumption of an informed broad waiver of rights. Lasting no more than ten (10) minutes, O'Brien read to Meyer the charges and informed him of certain rights, particularly those regarding the availability of public counsel. O'Brien himself testified that it would have taken him over an hour to read and fully understand the charging document that Meyer signed.

An appellate court, in considering the voluntariness of the defendant's statements, is not bound by determination of the trial judge or jury. The constitutional concerns of due process and the privilege against self incrimination subject the issue of a confession's admissibility to independent judicial review *Haynes v. Washington* 375 U.S. 511, 515 (1961). The Court of Special Appeals in *Meyer v. State* 43 M.D. App 427 (1978) did not review this issue, nor was it properly placed before the Court of Appeals. While the prior appellate proceedings had focused upon the delay of presentment issue as interpreted in *Johnson v. State*, the fundamental issue of the voluntariness of Mr. Meyer's statements and the violations of his constitutional privilege against self incrimination should now, all too belatedly, form the focus of judicial review. The fact cannot be ignored that Meyer's statements constituted almost the entire case against him; the other evidence taken alone culd never support a conviction. With this in mind, the words of the Supreme Court years ago appear clearly not to have lost any import:

> We cannot blind ourselves to what experience teaches: that even apart form the express threat, the basic techniques present here — the secret and incommunicado detention and interrogation — are devices adapted and used to extort confessions.

Haynes v. Washington 373 U.S. at 514. Mr. Meyer has been denied the opportunity until now to call upon the State to demonstrate that, in the face of the numerous indications to the contrary, Mr. Meyer freely waived his rights and voluntarily provided the State with the only solid evidence it had.

II. MEYER WAS DENIED HIS RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS, THROUGH HIS INCOMMUNICADO DETENTION FOR INTERROGATION.

Out of the approximately fifteen (15) hours that Meyer was held in police custody on October 8, 1977, he spent close to twelve (12) hours being interrogated, in turn, by two Prince George's County officers. Both of these officers testified that Meyer at no time requested that the interrogation stop and that he be allowed to reach counsel. Yet there is no corroborative testimony for the officer's account, as no one else was ever present during the interrogation. The other officers who were in contact with Meyer at some time during that day also testified that he never expressed a desire to seek counsel. Aside from the fact that these moments of contact were relatively short in duration and merely custodial in character, Meyer had no obligation to continually declare his desire to exercise his constitutional right to counsel to the world in order to preserve it. It is well recognized that a person who is accus-

ed of a crime, or who is the focus of a criminal investigation, and is held in police custody for interrogation is guaranteed the right to assistance of legal counsel; any incriminatory statements obtained without the presence of counsel and without information as to his rights is inadmissible. *Escobedo v. Illinois* 378 U.S. 478 (1964), *Massiah v. U.S.* 377 U.S. 201 (1969), *Brewer v. Williams* 430 U.S. 387 (1977). As the Supreme Cuort observed in *Massiah,* 377 U.S. at 204:

> A constitution which guarantees a defendant a right of counsel at trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra-judicial proceeding. Anything less might deny a defendant "effective representation by counsel" at the only stage when legal aid and advise would help him.

The Supreme Court later held that the *Massiah* rule applied unindicted defendants as well as for indicted defendants, *Escobedo* 378 U.S. at 485. The spirit of the law in *Massiah* is clear and was strongly reiterated in *Brewer v. Williams.* The crucial question with regard to Mr. Meyer, in light of the fact that he was never allowed contact with family, friends, or counsel, is thus: did Meyer knowingly and intelligently waive his right to counsel?

Meyer testified that he instructed his wife to contact his lawyer at the time of his arrest. This was not contradicted by any testimony, nor was the fact that Mrs. Meyer, family friends, and an attorney repeateldy, and unsuccessfully tried to contact Meyer while he was in custody. It was the State's contention that Mr. Meyer submitted to lengthy interrogation and made incriminatory statements voluntarily and that he voluntarily waived his right to counsel. It is true that an accused can waive such a right, but the

Supreme Court has made eminently clear the rigorous standards by which a claim of waiver made by the State must be evaluated. The Supreme Court reiterated these standards in *Brewer v. Williams* 430 U.S. 387, 404, in asserting that

> (I)t was incumbent upon the State to prove an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbest* 304 U.S. at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant. *Carnley v. Cochran* 369 U.S. 506, 513; *cf Mirana v. Arizona* 384 U.S. at 471, and that Courts indulge in every reasonable presumption against waiver, eg. *Brookhart v. Janis, supra* at 4; *Glasser v. U.S.*, 315 U.S. 60, 70.

The "appropriately heavy burden" of establishing a knowing and intelligent waiver of the right to counsel lies with the State not only in matters concerning trial, but with regards to an accused at a critical stage of the pre-trial proceedings as well. *Schneckloth v. Bustamonte* 412 U .S U.S. 218 (1973); *Watson v. State* 282 M.D. 73 (1977).

In the instant case, the nature of Meyer's detention raises a presumption against voluntary waiver. In *Escobedo* the Supreme Court found on facts strikingly similar to the instant case that the Sixth Amendment right to counsel can be violated by police practices which lend themselves to eliciting incriminating statements from an accused without fully informing him of his absolute right to remain silent and which deny him access to counsel when so requested, *Escobedo* 378 U.S. at 490. Since Meyer never signed any written waiver of rights, as the accused did in *Miranda,* the only evidence of any such waiver was the uncorroborated testimony of the police interrogators

and the fact that Meyer eventually made the statements. This evidence does not sustain the burden of proof required of the State in *Kier v. State* 213 M.D. 556 (1957); *Hale v. State* 5 M.D. App 326 (1968). The State was required to establish an intelligent and knowing waiver of rights; a waiver cannot be presumed either from the silence of the accused after warnings are given him or form the fact that a confession was eventually obtained, much as the State does in this case. *Miranda* 384 U.S. at 475; *Meyer v. State* 3 M.D. App 534 (1968).

The State was never required to explain why Meyer was kept isolated for so long from his family, friends, and attorney. The Court observed in *Nasirridden v. State* 16 M.D. App 479, 479 (1972), that "In ascertaining whether the court below made its decision as to the admissibility of the statements within the required constitutional framework, it is our duty to examine the entire record and make an independent determination of the ultimate issue of voluntariness. *Gardner v. State* 10 M.D. App 233, 245. So it is with the instant case *vis a vis* Meyer's claim that he was denied counsel. The Court in *Mullaney v. State* 5 M.D. App 248 (1968) held that a detrermination of an intelligent and voluntary waiver should be made from consideration of the total facts and circumstancs. *See Brown v. State* 3 M.D. App 313 (1967). If the right to counsel indeed attaches only to the defendant personally, and cannot be invoked by the defendant's wife or attorney, then certainly their denial by the State of access to Meyer certainly should be included in the Court's evaluation of the voluntariness of Meyer's alleged waiver of rights.

APPENDIX H

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY MARYLAND

GENE THOMAS MEYER	:	
Petitioner	:	
	:	
vs.	:	Criminal Trials No.
	:	18621/18623
STATE OF MARYLAND	:	Law No. 95079
Respondent	:	

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR POST CONVICTION REVIEW

The State's reliance on *Saul* v. *State,* 6 Md. App. 540, aff'd 258 Md. 100 (1970) to defend its position that there was no error committed where the Petitioner (hereinafter "Meyers") was involuntarily absent when the trial court considered the jury's request for a copy of Maryland Rule 723 is misplaced.

In that case, after the jury was instructed, the State and defense counsel made their final arguments. The jury then retired for deliberations. While deliberating, the jury sent a note to the court asking for the Maryland statute regarding the mental capacity of a defendant to commit a crime.

At that point counsel for the state and the defendant and the defendant himself were called into chambers to discuss the jury's request. Counsel examined the jury's note and agreed that a photostatic copy of the statute could be sent to the jury.

The Court did not reconvene, and the copy of the statute was delivered to the jury.

The Court of Appeals relied on the earlier decisions of *Young* v. *State,* 5 Md. App. 383 (1968) and *Midgett* vs. *State,* 216 Md. 26 (1958) and held that the defendant's involuntary absence when the copy of the statue was delivered to the jury raised conclusive presumption of prejudice. The conviction was reversed and remanded for a new trial in the Circuit Court for Prince George's County.

The Court was not, therefore, required as the State's memorandum suggests, to address the issue before this Court. In fact, the Court in*Saul,* supra, at 108, specifically states that it was unnecessary for it to decide the issue of the propriety of the judge receiving a note from the jury and answering it in the absence of the defendant.

In *Young,* supra, about an hour and a half after it had begun deliberating, the jury sent a note to the trial judge with a question. The jury returned to the box whereupon the Court instructed them in response to the note. It was stipulated on appeal that neither the defendant nor his attorney were present when the Court gave its additional instructions.

The Court of Special Appeals held that in so doing, the court had committed reversible error requiring reversal and new trial. Its decision was compelled by the right of the accused to be present at every stage of his trial, a right preserved by Article 5 of the declaration of rights, Constitution of Maryland and Maryland Rule 775. The Court also relied upon *Midgett* v. *State,* 216 Md. 26, at 36 (1957) for the proposition that:

> "In this State there is no doubt that an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is imapneled until ti reaches a verdict or is discharged, and there can

be no valid trial or judgment unless he has been afforded that right."

In *Midgett,* supra, two notes were sent to the court by the jury during their deliberations. The defendant was absent both times when the trial court undertook to answer the questions. The answers to the questions raised by the jury were not given to the jury in open court, but through an exchange of notes while the jurors remained in the jury room. In reversing the conviction of the Court of Appeals laid down the principle which has guided subsequent courts which have been called upon to address this violation:

> "The constitutional guarantee includes the right of the accused to be present (i) when the jury is charged or instructed on the facts, the law or form of the verdict, before it has begun its deliberations or afterwards upon its request or by direction of the court; (ii) when the court is repeating a charge or instruction previously given in whole or in part; (iii) when the court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the court and the jury; unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury." at 36.

Similarly, in *La Guardia* v. *State,* 190 Md. 450 (1948) during their deliberations the jury sent a message to the court inquiring whether less than twelve jurors could recommend mercy for one of the defendants. The judge replied to the question outside the presence of the defendant or counsel. He sent them a reply that less than twelve could recommend mercy.

The Court of Appeals found the error to be harmless because no juror made any recommendations concerning either of the appellants. The communication could not have possibly caused appellants prejudice.

However, the court did recognize that:

> "In a felony case the trial judge should not send any important communications to the jury in reference to the case after it has been submitted to them, except in open Court and with the knowledge of the accused and his counsel and their opportunity to be present. Private communications between the judge and jury, even though harmless in themselves, may open the way to abusers and destroy public confidence in legal procedure. *La Guardia,* supra, at 475.
>
> Similarly in *Shields* v. *U.S.,* 273 U.S. 583 (1927), the Supreme Court held it was reversible error for the trial judge without giving notice to the defendant to send a written instruction to the jury.
>
> In *Saul,* the defendant was absent for the actual giving of the transcript of the statute (a "part of the trial"); it was unncessary for the Court to consider whether the defendant's absence when the note was delivered from the jury to the judge and when the jury's request was being considered by the judge and counsel, was a prejudicial "communication".
>
> However, it is very significant that the Court in dictum stated that even though the trial court had committed reversible error in delivering the copy of the statute to the jury out of the defendants' presence, and it did not have to decide

whether the "communication" was prejudicial or not, it did note:

> "In any event, we fail to see where the record affirmatively shows an absence of prejudice or a tendency to influence the verdict of the jury and, as was said in *La Guardia,* 190 Md. 450 (1948)," * * * if *record shows error by such communication, but does not show whether or not the error was prejudicial, it is presumed to be prejudicial and requires a reversal." Id,* at 458 (emphasis added).

Thus the burden is still on the State to show that the record demonstrates beyond a reasonable doubt that the denial of the right in those instances would not have prejudiced the defendant. See also, *Noble* v. *State,* 293 Md. 549, 568-9 (1982).

A case nearly in point is *Bunch* v. *State,* 281 Md. 680 (1978). In that decision the Court of Appeals held that a criminal defendant was wrongfully denied the opportunity to be presnt or be consulted at a *bench conference* which occurred following the presentation of evidence during which the trial judge and counsel considered a note a juror had sent to the judge stating that he was biased. It is significant that the Court relied heavily on *Midgett,* supra, in its analysis of its holding that a defendant be present at the bench conference under those facts.

In the instant case, after being excused for deliberations, the jury sent a note to the judge during the luncheon recess asking for a copy of Maryland Rule 723, any laws read to it by the attorney(s) and testimony. (See attached copy of p. 810 of the transcript of April 26, 1978).

The judge called counsel to the bench and told them about the note and further told them that he would not

honor the request. The record does not reveal whether Meyer was present, but according to his sworn affidavit, he was absent from the bench conference. *See,* Meyer's affidavit, par. 9.

The State argues that the absence of Meyer from the judge's consideration of the request is shown neither to be prejudicial from the record nor had any influence on the verdict. However, Meyer has sworn under oath that he did not waive his right to be present and had he known of that right he would have requested that he be present for that part of the trial. *See,* Meyer's Affidavit, par. 9.

Participation by a defendant in his own trial is a fundamental right guaranteed by the Constitution. Indeed, it is one of the hallmarks of the American judicial system. The recent discussion of a defendant's right to be present and assist in his own trial in *Noble,* supra, reaffirms, this cornerstone of our system of justice. Here, the jury wanted a copy of an important Maryland Rule which would likely have great importance towards their ultimate decision in the case. It cannot be disputed by the State that the "waiver of counsel" issue was a criticial issue before the jury.

It is a tribute to the jury's diligence that it, in effect, told the trial court that it did not understand the instruction it had been given and that it could more properly render a fair verdict if it had the requested matters before them.

In fact, in *Saul,* supra, where this same issue arose, the trial judge did provide the jury with a copy of the Statute upon which its decision would be based.

Here, as in *Saul,* supra, and *Duffy,* supra, the jury obviously did not understand the instructions given in his presence or it would not have asked for further instruc-

tions. What greater example of a need to give the jury the written law which would ultimately decide the fate of the defendant could be imagined?

Meyer's affidavit states that he would have wanted to be present for the trial judge's consideration of the jury's request.

The issue of prejudice to a defendant must rest on the facts of each case. For example, in *Noble,* supra, a felony murder case, the Court found no prejudice where a prospective jury member was excused after telling the judge during voire dire that both his father and brother had been murdered. The Court held that although the defendant was absent from the bench conference at which time the prospective juror was excused, since the ruling was entirely favorable to the defendant, it would have been difficult to imagine what more the defendant could have obtained had he been present.

Also, the defendant admitted he knew nothing about the jury impaneling process and it was held that it was extremely doubtful that the defendant would have questioned the prospective juror anyway. The communication could not have caused the defendant any prejudice. *See also, La Guardia,* supra.

Contrasted with the defendant's admissions indicating that he could not have added anything to the process is Meyer's statement in his affidavit in this case in which he states he would have sought to participate had he been given the opportunity to do so. A denial of that right here emphasizes the burden on the State to show beyond a reasonable doubt that he could have not been prejducied.

The State has failed to meet that burden. It has not shown otherwise in any respect.

Nor is the State's reliance on *Brown* v. *State*, 225 Md. 349 (1960) proper. That case merely holds that a defendant has no right to be present while legal arguments over jury instructions take place.

The facts of that case are inapposite to those presented here, where after jury instructions were given to the jury, it returned a note to the judge and that note was examined and ruled on by the judge out of the presence of the defendant.

The State in this case also argues that the Court in *Saul,* supra, suggests that Meyer does not have grounds to protest because he was "present" in the courtroom (unlike Saul, who was in lockup when the conference on the judge's note took place), and because Meyer's counsel made no objection to the trial court's actions.

Firstly, the term "present" does not mean merely physically being in the courtroom. The clear purpose of a defendant's presence is so that he may have the opportunity to question or object to the discussion regarding the jury's question. A defendant's right to have input into those discussions was articulated in *Duffy* v. *State*, 151 Md. 456 (1926).

In that case the jury sent a vote to the trial judge during deliberations that it did not understand an instruction it had been given. In reversing the conviction due to the defendant's absence when the judge instructed them as to the form of the verdict:

> "It may be that it was a mere form of verdict and that it did not injure the defendant, but in dealing with an absolute constitutional right, the citizen ought not to be at the mercy of speculation as to whether the violation of it did or did

> not injure him. Since the jury did not understand the instructions as first given, it may have been that the prisoner, if present, when they were instructed a second time, would have asked that they be made clearer, or he may have objected to their form. * * * If we held that under such circumstances he had no right to be present, it is not easy to say under what circumstances his presence would be essential." *Duffy,* supra, at 476.

It is obvious that a defendant's right to be "present" means actually able to provide him the goings-on and provide assistance to his own case. In the instant case, although Meyer was in the courtroom during the bench conference, the record shows that he was not at the bench and therefore not able to lend assistance to his own case. (See, attached copy of p. 810 of transcript of April 26, 1978).

In fact, because the judge did not disclose the very existence of the jury's note to Meyer, it would be impermissible speculation for this Court to find that, as a matter of law, Meyer was not prejudiced.

Secondly, the State's argument that Meyer's counsel made no objection to his client's absence from the bench conference misreads what the Court of Appeals has stated in *Williams* v. *State,* 292 Md. 20, (1981). See also, *Noble* v. *State,* 293 Md. 549 (1982).

In *Williams,* supra, the Court held that if a defendant's attorney consents to the defendant's absence during voire dire questioning, or says nothing about the matter, the defendant's right to be present will be deemed to have been waived.

However, the Court of Appeals expressly stated that this change in the law was *prospective,* and only applied to

trials or parts of trials taking place afte the issuance of the mandate in that decision (December 28, 1981). *Williams* supra, at 220. Therefore, in this case, as was restated in *Noble,* supra, at 556, the waiver issue is governed by the former principle that an effective waiver of the right to be present could only be accomplished by the defendant personally and expressly. Here, Meyer clearly did not waive his right to be present during discussions about the jury's question.

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APPENDIX I

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

GENE THOMAS MEYER	:	
Petitioner	:	
	:	
Vs.	:	Law Number
	:	95,079
STATE OF MARYLAND	:	
	:	
and	:	
	:	
STATE OF MARYLAND	:	
	:	
Vs.	:	Criminal Trials
	:	Number 18,621
GENE THOMAS MEYER	:	
Defendant	:	

MEMORANDUM AND ORDER OF THE COURT

The Petitioner, Gene Thomas Meyer suggests that he is entitled to Post Conviction Relief from his conviction and sentence to imprisonment for murder in Criinal Trials Number 18,621 because:

I. He was denied his right to protection against self incrimination as guaranteed by the Fifth and Fourteenth Amendment of the United States Constitution, and Article 23 of the Maryland Declaration of Rights, by the use of the two statements taken during interrogation against him.

II. He was denied his rights to assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 21 of the Maryland Declaration of Rights, during the unreasonably long and unlawful detention for purposes of interrogation.

III. He was denied his right to a timely copy of the arrest warrant as guaranteed by Maryland Law.

V. He did not waive any right to appeal the issues of this petition because of inadequate representation by the Public Defender in the appeal of his Circuit Court conviction.

The Court is of the view that the contentions raised in items numbered I, II and V were disposed of by the Court of Special Appeals in *Meyer* v. *State*, 43 Md. App. 427. The issue then raised on appeal was the state's failure to comply with MDR 723 prior to the taking of a statement of Mr. Meyer. The Court held that the first statement given by him was erroneously admitted into evidence but that such was harmless error.

Although the Court noted therein (footnote 4 p). 432) . . . "that the appellant does not on appeal challenge the voluntariness of his statements or the adequacy of his waiver of his Miranda rights", the Court went on to say at p. 438 . . . "that the state demonstrated that the second statement was a product of the appellant's free will divorced from the preceding illegal detention." Thus the Court resolved the issue raised by Petitioner in his contentions I and II.

Petitioner's contention numbered V is premised on his counsel's failure to raise as issued on appeal the challenged voluntariness of his statements and the adequacy of his waiver of his Miranda rights. Implicit in the Court's holding in *Meyer,* supra, p. 438 . . . "that the State demonstrated that the second statement was a product of the appellant's free will . . .", is its consideration of the very matters that petitioner says his attorney failed to raise on appeal. Thus failure by counsel to raise those issues did not prejudice the petitioner.

The Court is of the further view that the failure of the police to serve the arrest warrant on the petitioner as directed by MDR 720(f) and Rule 720(3) of the Maryland Rules accords him no relief at this stage. The Court is aware that the Rules of Procedure are not guides to the practice of law but precise rebrics established to promote the orderly and efficient administration of justice, they must be read in light, however, of that which they were designed to accomplish. Service of the arrest warrant would have effectuated notice to the petitioner of of the crimes of which he was being charged. He was so notified by Officer Hatfield prior to his rendition of either statement and inasmuch as the second statement of the petitioner was made after he had been formally charged and had appeared before the Commissioner, he cannot be heard to complain that he was induced to make that statement by Officer Hatfield's earlier recital of Lewis' confession, a copy of which was attached to the unserved warrant for the arrest of the petitioner.

The proposition that the petitioner ought to be granted a new trial because he was not accorded the right to participate in a bench conference arises because the Jury Foreman inquired of the Court during the luncheon break whether he could ask a question. The Court's reply was "put it in writing." Such was done and upon resumption of the trial the bench conference of which petitioner complains ensued. The Court declined to grant the Jury Foreman's request that the jury be furnished with the laws that had been read to them, copies of the law regarding defendant's rights re: 723 (Rule 723) and the testimony. Following immediately thereafter closing argument commenced. The petitioner was present in the courtroom during the bench conference but not at the bench.

While recognizing that the accused is entitled to be present at every stage of his trial the failure of the court to

have him at a bench conference during which the Court merely advises counsel concerning the receipt of a note from the jury and its decision regarding the request was not part of the trial. Such is not unlike the Court's en camera discussion of instructions or other matters of law which are held outside the presence of an accused. Merely because the discussion pertaining to the note was held in the Courtroom outside the presence of the jury and ostensibly outside the hearing of the petitioner does not enhance the instruction discussion stage of the proceeding. In *State* v. *Brown*, 225 Md., p. 353 the Court of Appeals said that it is . . . "customary and proper for the trial judge to receive prayers and to hear argument of counsel in chambers during recess, out of the presence of the parties and the jury. The reception of prayers and supporting oral argument has never been considered as part of the trial."

In *State* v. *Saul*, 258 Md. 100 the Court of Appeals sustained the holding of the Court of Special Appeals in *State* v. *Saul*, 6 Md. App. 540 that . . ."the delivery of the note from the jury to the judge was merely a ' "communication" and that its reception by the judge, the conference with counsel and the agreement to give a copy of the statute to the jury did not amount to a part of the trial." ' The Court went on to say that "a mere 'communication' by the judge to the jury is not a part of the trial and the accused is not entitled to be present as a matter of right. But even then there is reversible error 'unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.' " The Court's remarks to the foreman, i.e. "put it in writing," was not part of the trial, nor was it prejudicial nor did it tend to influence the verdict of the jury. The rendering of the Court's reply to the jury was an integral part of the trial, at which the petitioner was pre-

sent. Had counsel concluded that the Court abused its discretion in failing to comply with the Foreman's request he could have noted his exception thereto thus preserving the matter for appeal. Thus, petitioner's claim that he was denied the right to be present at all stages of his trial is without merit.

In view of the aforegoing, it is by the Circuit Court for Prince George's County, Maryland, this 11th day of April, 1983,

ORDERED, that the Petition for Post Conviction Relief filed herein be and the same is hereby DENIED.

[sgd] James H. Taylor
JUDGE

Copies Mailed By The Court To:

John T. Bell, Esquire
101 West Jefferson Street
Rockville, Maryland 20850

Raymond F. Ciarrocchi, Esquire
State's Attorney's Office

Assignment Office

[sgd] Jan Dunivant
Jan Dunivant, Secretary
Date: April 11, 1983

APPENDIX J

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

GENE THOMAS MEYER Petitioner/Appellant	:	
vs.	:	In the Circuit Court of Prince George's County,
STATE OF MARYLAND Respondent/Appellee	:	Maryland – Law No. 95079
**********	:	
STATE OF MARYLLAND	:	
vs.	:	Circuit Court for Prince George's County, Maryland – Criminal No. 18621
GENE THOMAS MEYER Defendant	:	

APPLICATION FOR LEAVE TO APPEAL

The Petitioner, Gene Thomas Meyer, by his attorney JOHN T. BELL, moves pursuant to Maryland Rule BK46, Maryland Rule 1011 and Article 27. Section 6451 of the *Annotated Code of Maryland* (1982 Repl. Vol), for leave to appeal the Memorandum and Order of Court issued April 11, 1983 by the Honorable James Taylor, Judge, Circuit Court for Prince George's County, Maryland, on his Petition for Post Conviction Relief to the Court of Special Appeals of Maryland on grounds as follows:

1. The record of the pleadings in this case, exclusive of the transcript of the testimony and proceedings before Judge Taylor on March 21, 1983 are attached. These pleadings, and the approximate dates filed, are as follows:

(a) Statements of Facts and Memorandum of Law filed on or about October 28, 1982.

(b) Petition for Post Conviction Relief filed on or about October 28, 1982.

(c) Motion for Continuance filed on or about January 20, 1983.

(e) Writ of Habeas Corpus Ad Testificandum filed on or about February 18, 1983.

(f) Petition for Writ of Habeas Corpus Ad Testificandum filed on or about February 18, 1983.

(g) Verification of Petition for Post Conviction Relief filed on March 21, 1983.

(h) Memorandum and List of Cases filed on or about March 22, 1983.

(i) Supplemental Memorandum of Law in Support of Petition for Post Conviction Relief filed on or about March 29, 1983.

(j) Memorandum and Order of the Court filed on or about April 11, 1983.

2. The primary evidence against the Petitioner, which resulted in the murder convictions in the case cited above, were two statements made to the police during fifteen (15) hours of interrogation by the police while the Petitioner was held in seclusion on the day he was arrested. Petitioner's trial counsel, through motions to suppress, as grounds, raised the issues that (a) Petitioner was never advised as to his right to remain silent as required by the *Miranda* decision; and (b) Petitioner was denied his right to the assistance of counsel by the police refusal to allow his counsel to see him during the interrogation.

3. The Office of the Public Defender of the State of Maryland represented the Petitioner in the appeal from the convictions to the Court of Special Appeals of Maryland. Petitioner's appellate counsel did not confer with the Petitioner before preparing and filing his Brief to the Court of Special Appeals. She met with the Petitioner for the first time to discuss what issues were to be raised on appeal the day after the Brief was filed. Although the Brief raised the contention that the trial judge should have suppressed the statements, the only grounds stated in the Brief were the violation of Maryland Rule 723 in that the Petitioer was not taken before a Commissioner until nine (9) hours after his arrest because of the police desire to interrogate the Petitioner. In *Meyer* v. *State,* 43 Md. App. 427, it was held that although the police procedure violated the Maryland Rule 723, it has harmless error because the initial statement was exculpatory and the second statement, given later in the day, although inculpatory, was the product of a free will on the part of the Petitioner.

4. In his Petition for Post Conviction Relief, the Petitioner raises the issue that appellate counsel did not brief or raise the issues on appeal of his denial of his *Miranda* rights or of his denial to right to counsel in support of the appellate contention that the motions to suppress the statements in the lower court should not have been denied. Both the Affidavit filed in support of the Petition and the proffered testimony at a hearing before Judge Taylor would have established that the Petitioner did not waive these two issues on direct appeal, and that appellate counsel on her own decided not to raise those issues. It was held by Judge Taylor in his Memorandum and Order of April 11, 1983 that, although recognizing the statement in the appellate decision by the Court of Special Appeals in footnote 4 on page 432 of that Opinion "that the Appel-

lant does not on appeal challenge the voluntariness of his statements or the adequacy of his waiver of his *Miranda* rights", the issues of which the Petitioner complains in the Petition for Post Conviction Relief had been raised and decided adversely to him in the direct appeal from his convictions.

5. Such a holding ignores the fact that the Petitioner's appellate counsel did not raise in the appellate brief in an effort to obtain a reversal of the convictions based on the wrongful admission into evidence of the Petitioner's statements, that he was denied his right to counsel and to be advised of his rights to remain silent during the police interrogation of fifteen (15) hours on the day he was arrested. Judge Taylor's decision in this case holds that the Court of Special Appeals against their own Rules and judicial policy, decided issues, namely the right to counsel and the right against self-incrimination based on the *Miranda,* on its own, *sua sponte,* in that they were not raised by Petitioner and that such a *sua sponte* determination is binding on the Petitioner in this proceeding even though they were not raised by his own appellate counsel on direct appeal. This ruling by Judge Taylor in this case resulted in his refusal to consider the merits of Petitioner's issues I, II, and V brought by the Petition, which is reversable error. It is respectfully submitted that the Memorandum that was filed in support of the Petitioner's Petition for Post Conviction Relief establishes under the facts and circumstances of the case the Petitioner was denied these rights, and such should have led the trial court to suppress the statements, and therefore such error would have been material and harmful, justifying a reversal of his murder convictions on direct appeal.

6. In addition, the failure of the police to provide the Petitioner with a copy of his arrest warrant during the

morning interrogation on the day of his arrest as required by law provided the police with an opportunity to extract a confession from the Petitioner by the device of using portions of the statement given by the co-conspirator, Lon Lewis, not known by Meyer, as an interrogation technique. Such statement was attached to the arrest warant, and the Petitioner would certainly had not been as vulnerable or as open in giving a statement had he been provided with the arrest warrant and the accompanied statement by Lewis. Again, this was not raised on appeal and was not waived by the Petitioner in any prior proceedings.

7. The Petitioner was denied his right to be present during his trial as guaranteed by Maryland Rule 724 during a communication between Judge and jury for the reasons set forth in the Memorandum of Law attached to the Petition for Post Conviction Relief and in one filed thereafter on March 29, 1983. In short, the Petitioner was not given the opportunity to be present during a Bench conference in open court where the trial judge read to his counsel a note received from the jury requesting copies of Maryland Rule 723, the trial transcript, and the laws quoted by the court in its instructions. The Judge decided to answer a request in the negative. When counsel returned to trial table, and the jury was present in the court room, the Judge indicated only that the answer to the quesetion was no. The Petitioiner, not having been present when the Judge read the note to his counsel at the Bench conference, could not have understood what the court was saying to the jury and the communication he heard could have had no real meaning to the Petitioner. Under such circumstances, it is fiction to believe that the Petitioner was afforded his right to be present during communications between Judge and jury when he only heard half the communication, and that half indicated nothing as to what the communication be-

tween jury and Judge had been. The trial judge here erred in applying the *Saul* decision and in characterizing this in an argument on a question of law or on instructions.

BELL, CORNELIUS & SHORE

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GROUNDS & AUTHORITIES

Maryland Rule BK46
Maryland Rule 1011
Article 27, Section 6451 of the Annotated Code of Maryland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 1983, I mailed, postage prepaid, a copy of the aforegoing to Raymond F. Ciarrocchi, Esquire, State Attorney's Office, Upper Marlboro, Maryland 20870.

JOHN T. BELL

APPENDIX K

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Application for Leave to Appeal

No. 58

September Term, 1983

POST CONVICTION

GENE THOMAS MEYER

v.

STATE OF MARYLAND

Mason,
Liss,
Adkins,
JJ.

Per Curiam

Filed: July 27, 1983

Gene T. Meyer, applicant for leave to appeal a denial of post-conviction relief, was convicted on April 26, 1978, by a jury, of the murder of a woman and her child. We affirmed that conviction in *Meyer* v. *State*, 43 Md. App. 427, *cert. den.* 286 Md. 750 (1979), *cert. den.* 446 U.S. 938

(1980). A petition for post-conviction relief was filed November 4, 1982, and relief sought in that petiton was denied on April 11, 1983. This application was filed on April 29, 1983, and because Meyer has failed to show error in the April 11 denial of relief, we in turn deny him leave to appeal.

Among the issues raised on direct appeal was the denial of Meyer's motion to suppress two statements which he gave to police after having been arrested. The first, which was exculpatory, was taken before Meyer's initial bail hearing, and the second, which was inculpatory, was given after. We held admission of the first statement erroneous, because of violation of MDR 7823, requiring prompt presentment of a defendant to a district court commissioner. *See Johnson v. State,* 282 Md. 314 (1978). But because of its exculpatory nature, the error was harmless. We found that the second inculpatory statement "was a product of the [applicant's] free will divorced from the preceding illegal detention." 43 Md. App. at 438. We also reviewed the trial judge's finding of "the voluntariness of [Meyer's] statements [and] the adequacy of his waiver of his *Miranda* rights," notwithstanding the lack of a challenge thereto, and implicitiy found no "manifest abuse of discretion." *Id.* at 432, n. 4.

In his petition for post-conviction relief, Meyer asserted that his statements were not voluntary, that he did not waive his *Miranda* rights, and that his appellate counsel's failure to raise these issues on appeal was contrary to his express direction, and should not be interpreted as a waiver to raise these issues in post-conviction proceedings. The post-conviction court concluded not that there was a waiver, but that these issues were disposed of by our decision. In his application, Meyer denies that our treatment

of these issues disposed of them, and that the post-conviction court erred in so concluding. He asserts that his post-conviction petition and supporting memorandum establish that "under the facts and circumsances of the case [Meyer] was denied [his] rights, and such should have led the trial court to suppress the statements, and therefore such error would have been material and harmful, justifying a reversal of his murder convictions on direct appeal."

We agree with the post-conviction court that our previous decision disposed of this issue, and in the alternative, that the petition and memorandum provide nothing which shows an abuse in discretion in the trial court's finding of voluntariness and waiver. The suppression hearing was conducted over a period of four days, and there is no indication that Meyer was prevented from fully asserting his story regarding his detention and confessions. As we previously stated, "Judge Levin chose to believe the police officers' version." *Id.* at 432, n. 4.

Meyer also argues that the failure of the police to comply with MDR 720(f] and Md. Rule 720(e), which require that the police provide him with a copy of his arrest warant and accompanying charging documents (including here the statement of Meyer's alleged co-conspirator), prejudiced his case and should result in a reversal of his convictions. The post-conviction court concluded that such a failure "affords him no relief" since those rules are intended to provide notice to a defendant of that with which he has been charged, and Meyer was in fact notified by the police when arrested. We find that persuasive, but additionally, a rationale basically the same as that applied to the MDR 723 violation applies here. Any error which may have existed when the first statement was given by Meyer was harmless, because that statement was exculpatory.

When the seocnd statement was given, Meyer had seen the court commissioner and had been informed of the charges against him, and had presumably received the material charging documents. Thus, the second inculpatory statement was given after both service/notice rules had been satisfied, and there was no error surrounding this confession.

The final issue raised in Meyer's petition and application relates to an alleged failure of the right to be present at stages of the trial. The trial judge received an oral request from the jury foreman to supply the jury with a copy of MDR 723. The judge's response was to have the foreman "put it in writing," and when that was done, the judge discussed it with counsel, but not Meyer. The judge decided against providing the jury with the requested rule, and so stated on the record, in the applicant's presence.

The post-conviction court correctly concluded that Meyer showed no error here. Meyer was not entitled to be present when the foreman requested a copy of the rule. *State* v. *Saul,* 258 Md. 100 (1970), *aff'g* 6 Md. App. 540 (1969), *ovrld on other grounds, Noble* v. *Stae,* 293 Md. 549 (1982); *State* v. *Brown,* 225 Md. 349 (1961), *cert. den.* 372 U.S. 760 (1963). Meyer was not entitled to be present during the conference between court and counsel regarding the request. *State* v. *Tuminello,* 16 Md. App. 421 (1972). Meyer was entitled to be present, and was present, when the court denied the request in open court. *State v. Saul, supra.*

APPLICATION FOR LEAVE TO APPEAL DENIED.